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Nos. 96-

IN THE
Supreme Court of the United States
October Term, 1996

OPHEL H. ZEVALKINK,
Petitioner,
v.
JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,
Respondent,

ELEANOR M. HESSE,
Petitioner,
v.
JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT L. NELSON
General Counsel
MICHAEL P. HORAN
Associate General Counsel
KAREN B. LEVIN
PARALYZED VETERANS OF AMERICA
801 Eighteenth St., N.W.
Washington, D.C. 20006-3517

EDWARD W. WARREN
Counsel of Record
CHRISTOPHER A. COLE
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioners

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QUESTIONS PRESENTED

1. May the Court of Veterans Appeals dismiss a veteran's pending appeal when he dies and deny his widow the right to be substituted as the appellant?

2. May a widow who has been thus denied the right to pursue an appeal (or any other accrued benefits applicant) be collaterally estopped in subsequent administrative proceedings from challenging the factual and legal issues that were previously decided against the veteran and hence the subject of the dismissed appeal?

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Petitioners respectfully petition for a writ of *certiorari* to review the two cases, which were consolidated below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published at 102 F.3d 1236 (1996) and reprinted in the Appendix ("Pet. App.") at 1a. The opinion of the Court of Veterans Appeals in *Zevalkink v. Brown* is published at 6 Vet. App. 483 (U.S. CVA 1996) and reprinted at Pet. App. 17a. The CVA orders entering judgment and recalling the mandate in *Hesse v. Brown*, No. 90-763, are reprinted at Pet. App. 53a and Pet. App. 51a, respectively. The underlying Board of Veterans' Appeals' decisions in *Hesse* and *Zevalkink* are reprinted at Pet. App. 36a and Pet. App. 63a, respectively.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to these consolidated cases pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on December 17, 1996.

PROVISIONS INVOLVED

The Fifth Amendment to the Constitution states, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 5121 of Title 38 states, in pertinent part:

> § 5121. Payment of certain accrued benefits upon death of a beneficiary.
>
> (a) . . . periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death (thereafter in this section and section 5122 of this title referred to as "accrued benefits")

> and due and unpaid for a period not to exceed two years,[1] shall, upon the death of such individual be paid as follows: . . . (2) Upon the death of a veteran, to the living person first listed below: (A) The veteran's spouse; (B) The veteran's children (in equal shares); (C) The veteran's dependent parents (in equal shares) . . . .

STATEMENT OF THE CASE

Veterans who suffer continuing disabilities from injuries or diseases sustained during active military service are entitled to federal disability benefits under laws administered by the Department of Veterans Affairs ("VA"). *See* 38 U.S.C. §§ 1101 *et seq.* Veterans seeking such benefits must file original claims with a VA Regional Office. The Regional Office must assist the veteran in developing the factual basis for the claim (whether through conducting medical examinations, searching for relevant records or otherwise) and issue a decision granting or denying the claim. *See* 38 C.F.R. § 3.103(c). Proceedings are ex parte in nature and no government official appears in opposition to the claim. *See id.* § 3.103(a). Congress designed this process to be informal and nonadversarial. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-10 (1985).

Veterans whose claims are denied by the Regional Office may file a notice of disagreement, triggering the agency appellate review process. If the Regional Office adheres to its original decision, the claim may be presented to the Board of Veterans' Appeals ("BVA"). BVA hearings are also informal and ex parte in nature. As at the Regional Office, there is neither formal questioning nor cross examination, and the

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[1] When construed by the courts below, this provision read "due and unpaid for a period not to exceed one year . . . ." The provision was amended by Pub. L. 104-275, § 507, Oct. 9, 1996, 110 Stat. 3343.

formal rules of evidence do not apply. *See* 38 C.F.R. § 19.157; *see also Walters*, 473 U.S. at 311.

If a veteran dies while pursuing a claim, his or her survivors are entitled to file a claim for accrued benefits "due and unpaid" the veteran based on "existing ratings or decisions, or those based on evidence in the [veteran's] file at date of death." 38 U.S.C. § 5121. Any such benefits are awarded in order of preference, first to the veteran's spouse, and if no spouse is living, to his or her children, then to the parents if no children are living, and so on. *Id.* Importantly, these benefits are not the same as those that would be available in the event of a successful appeal. The benefits under § 5121 are strictly limited to two years of benefits owed the veteran. *See supra* at 2, n.1.

Until 1988, BVA decisions were not subject to judicial review. In that year, Congress created the United States Court of Veterans Appeals ("CVA"), an Article I court with jurisdiction limited to appeals of veterans' benefits claims. *See* Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, *reprinted in* 1988 U.S.C.C.A.N. 5795. The United States Court of Appeals for the Federal Circuit has direct and exclusive appellate jurisdiction to review conclusions of law rendered by the CVA. *See* 38 U.S.C. § 7292.

1. *Factual Background in Hesse v. Brown, Number 94-7012.*

In April 1990, Bert Hesse, a World War II veteran suffering from chronic obstructive pulmonary disease, appealed to the CVA from an adverse BVA decision denying him disability benefits. Mr. Hesse died in November 1990, before his appeal had been argued.

Within two weeks of his death, petitioner Eleanor Hesse, his wife of nearly 50 years, wrote a letter to the clerk informing the CVA of her husband's death and requesting that she be allowed to "continue the court case . . . to its conclusion." The

court initially authorized substitution of Mrs. Hesse under its then-effective "Interim General Rule 43."[2] It then proceeded to rule in Mrs. Hesse's favor on the merits and remanded the case to the BVA.[3]

On remand, the BVA decided against Mrs. Hesse and she again appealed to the CVA. While this renewed appeal was pending, the CVA held in *Landicho v. Brown*, 7 Vet. App. 42, 54 (1994), that the widow of a veteran who dies during the pendency of his CVA appeal has no standing to be substituted as an appellant. Rather than pursuing her deceased husband's claim, the court ruled, she may only file a separate application for accrued benefits due and unpaid her husband pursuant to 38 U.S.C. § 5121. She must obtain a final decision on *that* claim before the court obtains jurisdiction to hear her appeal.

In light of *Landicho* and the CVA's decision in *Zevalkink v. Brown* (discussed in the next section), Mrs. Hesse filed a motion requesting voluntary dismissal of her appeal on condition that she be allowed to test the legal bases of the dismissal at the Federal Circuit. The CVA granted the motion, stating "judgment [will] be entered as the appellant concedes would be required under the decisions of this court in *Zevalkink v. Brown* . . . and *Landicho v. Brown* . . . ." Pet. App. 53a (citations omitted).

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[2] That rule provided for substitution "as a matter of course" for the "personal representative" of a deceased appellant's estate, or "if there is no personal representative, substitution may be as the Court directs."

[3] The CVA held that the BVA had arbitrarily failed to address two key pieces of evidence submitted by Mr. Hesse before he died: (1) hospital admission cards evidencing Mr. Hesse's wartime hospitalization; and (2) a document labeled as a "VA Form P-80" that appeared to substantiate his contention that the VA had determined his lung condition was service connected as early as 1946. Pet. App. 61a.

Mrs. Hesse appealed to the Federal Circuit, which issued the decision challenged by this petition.

2. *Factual Background in Zevalkink v. Brown, Number 95-7101.*

James Zevalkink, a World War II veteran, had applied during his life for VA disability benefits resulting from a kidney disorder he claimed was incurred while on active duty. The Regional Office denied his claim and the BVA in 1985 denied Mr. Zevalkink's administrative appeal. *See* Pet. App. 2a. His wife, petitioner Ophel Zevalkink, was not a party to nor given notice of these Regional Office or BVA proceedings.

Mr. Zevalkink died in 1988. After his death, Mrs. Zevalkink filed with the Regional Office an original claim for "accrued benefits" pursuant to 38 U.S.C. § 5121. The Regional Office denied her claim in August 1989. It reasoned that she had not submitted "new and material evidence" that would justify reopening her deceased husband's claim. Pet. App. 2a. Mrs. Zevalkink appealed this adverse decision to the BVA.

In June 1991, the BVA denied Mrs. Zevalkink's administrative appeal. Mrs. Zevalkink then appealed to the CVA. The CVA also denied her appeal, holding that accrued benefits claimants are essentially collaterally estopped from "relitigating" claims previously and finally denied the deceased veteran. *See* Pet. App. at 25a-26a. The CVA reasoned that, pursuant to VA statutes, such previously decided claims may not be reopened unless the claimant submits or otherwise identifies new and material evidence in proof of the claim, just as the deceased veteran would have been required to do during his life to reopen a finally denied claim. *Id.* at 28a.

Mrs. Zevalkink appealed to the Federal Circuit, which issued the decision challenged in this petition.

3. *The Consolidated Decisions Below.*

In the consolidated appeals of Mrs. Hesse and Mrs. Zevalkink, the Federal Circuit affirmed the underlying

CVA decisions in all respects. *First*, the court held that a veteran's pending CVA appeal does not survive his death and that a widow or other putative accrued benefits applicant must pursue a separate agency claims procedure instead of seeking substitution as the appellant on the veteran's claim. *Second*, the court also ruled that, even if the claim survived, putative accrued benefits applicants have no standing to be substituted before the CVA on the veteran's pending claim because they have not demonstrated their eligibility under § 5121. The court reasoned that any decision it might reach as to the merits of the *veteran's* claim might well be hypothetical because the agency had not yet determined whether there were any eligible accrued benefits recipients. Pet. App. 15a.

Third, the court held that an accrued benefits applicant "stands in the shoes" of the veteran with respect to the procedural posture of the veteran's underlying claim. Thus, an accrued benefits applicant is collaterally estopped from raising any issues previously and finally decided against the veteran during his lifetime. The only statutory exception to such preclusive effect, the court held, is set forth in §§ 5108 and 7104 of Title 38, which provide for reopening of a finally denied claim upon submission of "new and material evidence" in support of that claim. Thus, the court reasoned, the accrued benefits applicant must "point to new and material evidence in the veteran's file" in order to "re-open the veteran's claim for benefits which has previously been finally denied." Pet App. 15a.

The court concluded that the main thrust of § 5121 is to pay benefits "due and unpaid" to the veteran based on "existing ratings and decisions." Pet. App. 10a. It reasoned that an accrued benefits applicant should have no greater right to relitigate previously denied claims than the veteran. *Id.*

REASONS FOR GRANTING THE WRIT

The decisions below create an unconscionable "Catch-22" for the widows of veterans who die during the pendency of an appeal to the Court of Veterans Appeals: the widow may not pursue her husband's appeal, but she is also collaterally estopped from challenging the factual and legal issues that were the subject of that appeal in any subsequent VA proceeding.

Because the Federal Circuit's jurisdiction over the administration of veterans' benefits laws is *exclusive*, there can be no conflict between federal courts of appeals as to these issues. Nevertheless, the CVA and Federal Circuit stand alone against a tide of decisions that provide for survival of similar government benefits claims, where the entitling statutes are silent as to claims survival. The CVA and Federal Circuit have also ignored the operative language and purpose of 38 U.S.C. § 5121 which requires the VA to conduct a *de novo* review of "evidence in the veteran's file at date of death," irrespective of whether such evidence has been previously reviewed by the VA. The courts' holdings precluding such review therefore deny petitioners' procedural due process rights provided by statute.

Each of the decisions below therefore warrants review pursuant to Sup. Ct. R. 10(a). Unless *certiorari* is granted as to these important federal law questions, the flawed decisions below will continue to define the rights of aging or sick veterans and their families.

I. THE FEDERAL CIRCUIT'S DECISION THAT VETERANS' CLAIMS DO NOT SURVIVE THEIR DEATHS CONFLICTS WITH THE UNIFORM RULE UNDER OTHER BENEFITS STATUTES.

The Federal Circuit held below that Mr. Hesse's claim did not survive his death because Congress made no explicit provision for survival of a veteran's claim in the applicable VA

statutes. That holding conflicts with the uniform rule that all government benefits claims are presumed to survive the deaths of the claimants.

The Federal Circuit does not deny that claim survival is the default principle but instead points to a separate VA "accrued benefits" claim procedure as providing an alternative means of recovery. But in the very same opinions below, the Court goes on to hold that accrued benefits claimants are collaterally estopped from relitigating issues previously decided by the VA against the veteran during the veteran's lifetime. In so holding, the court is explicit that Mrs. Hesse is precluded from raising issues pending on Mr. Hesse's appeal before his death.

The court thus wipes out all claims on appeal at the veteran's death—claims that may involve years of wrongly withheld benefits—and acknowledges in their place only a limited administrative claim. In pursuing that claim, the veteran's spouse is precluded from arguing the merits of any issues that were pending at the veteran's death. This accrued benefits claim, moreover, is limited to only two years' worth (previously one year's worth) of benefits instead of the total of all benefits wrongly withheld. As demonstrated below, this combined holding derived from *Hesse* and *Zevalkink* is contrary to the statute and violates petitioners' due process rights.

A. The Well-Established Default Principle Provides For Survival Of Government Benefits Claims Following The Claimant's Death.

Absent an explicit statutory provision to the contrary, the universal background rule is that federal benefits claims survive the death of the claimant. Federal courts thus routinely permit the substitution of survivors or personal representatives pursuant to Federal Rule of Civil Procedure 25(a) and Federal Rule of Appellate Procedure 43(a). Despite that rule, the Federal Circuit has created the opposite presumption—that

statutory silence as to survival means that claims *abate* upon the claimants' deaths. *See Landicho*, 7 Vet. App. at 47 (concluding the veteran's claim abates, in part because "[c]hapter 11 of title 38 makes no provision for survivors.").

The mere fact of statutory silence regarding the survival of benefits claims does not mean that Congress intended the action to abate upon the death of the claimant. *See, e.g., Mallick v. International Bhd. of Elec. Workers*, 814 F.2d 674, 677 (D.C. Cir. 1987). Where federal statutes are silent as to survival of claims, courts have commonly formulated a federal rule of decision that best serves Congress' goals under the statute in question. *See, e.g., Carlson v. Green*, 446 U.S. 14, 23-25 (1980); *Mallick*, 814 F.2d at 676-77. The statutory framework and purpose govern that inquiry. *See, e.g., Cox v. Roth*, 348 U.S. 207, 210 (1955). The paramount policy consideration is the deterrence of "protracted recalcitrance made possible, in part, by the abatement of . . . lawsuits upon the death of an individual plaintiff." *Mallick*, 814 F.2d at 677. Termination of pending CVA claims upon the deaths of the veterans similarly creates an incentive for the VA and CVA to delay adjudication and protract appellate litigation.

Because of these considerations, the background rule under all federal benefits statutes is that claims survive the deaths of the claimant unless Congress' contrary intent is explicit. The application of this federal presumption is perhaps best illustrated by the Social Security Act, which administers a disability benefits program closely comparable to that under veterans benefits laws. *See Walters*, 473 U.S. at 333. Under the Social Security disability benefits program, survivors with a derivative claim for benefits may adopt a deceased claimant's claim in the administrative process. These derivative claimants may also pursue judicial review upon exhaustion of administrative remedies. *See* 20 C.F.R. § 404.908 (any interested party may request reconsideration); 20 C.F.R.

§ 404.957 (party may request a hearing before an administrative law judge).

No federal court ever questioned the rights of these derivative Social Security claimants to be substituted in federal court for a deceased claimant or to seek judicial review of administrative determinations adverse to the deceased claimant's interest (and thus their own). *See McCoy v. Chater*, 81 F.3d 44, 45 (6th Cir. 1995), *cert. denied*, 166 S.Ct. 2557 (1996); *Swenson v. Sullivan*, 876 F.2d 683, 684 (9th Cir. 1989); *Coffman v. Bowen*, 829 F.2d 514, 516 (4th Cir. 1987); *Neal v. Bowen*, 828 F.2d 1027, 1029 (4th Cir. 1987); *Spencer v. Heckler*, 765 F.2d 1090, 1091 (11th Cir. 1985); *Smith v. Harris*, 644 F.2d 985, 988 (3d Cir. 1980); *Price v. Richardson*, 443 F.2d 347 (5th Cir. 1971); *Murphy v. Gardner*, 379 F.2d 1, 2 (8th Cir. 1967).

Other federal benefits laws likewise have been interpreted to permit survival of claims after the deaths of claimants. For example, the inherent unfairness in the old common law rule that claims "personal" to the deceased were extinguished at death prompted this Court to interpret the Jones Act to permit the survival of a seaman's cause of action upon the death of either the tortfeasor or the claimant. *See, e.g., Cox v. Roth*, 348 U.S. 207, 210 (1955) (claim not defeated by death of tortfeasor); *see also Boggs v. Dravo Corp.*, 532 F.2d 897, 901 (3d Cir. 1976) (claim not defeated by death of claimant).

This presumption in favor of claim survival has been extended to claims against employers under the Federal Employers Liability Act ("FELA") and Age Discrimination in Employment Act ("ADEA"). *See, e.g., Dellaripa v. New York, New Haven & Hartford Ry.*, 257 F.2d 733, 735 (2d Cir. 1958) (death of father of deceased employee during pendency of action does not defeat FELA claim); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 n.3 (4th Cir. 1985) (substitution of administratrix for deceased claimant is permissible under ADEA). Courts also have employed the same presumption to

claims arising under the Federal Mine Safety and Health Act, the False Claims Act, and section 1983 of the Civil Rights Act. *See, e.g., United States v. NEC Corp.*, 11 F.3d 136, 138 (11th Cir. 1994) (*qui tam* action survives death of relator); *Kowaleski v. Directors, Office of Worker Comp. Programs, Dep't of Labor*, 879 F.2d 1173, 1177 n.4 (3d Cir. 1989) (implying that surviving spouse would have the right to substitute as a claimant for black lung benefits pending before the court), *cert. denied*, 493 U.S. 1070 (1990); *Bennett v. Tucker*, 827 F.2d 63, 68 (7th Cir. 1987) (civil rights action survives death of claimant in favor of estate's executor); *Maddox v. Califano*, 601 F.2d 920 (6th Cir. 1979) (sons of widow of black lung benefits claimant may be substituted).

Statutory provisions such as § 5121, designed to *protect* certain classes of survivors from the automatic loss of monies owed to or claims held by claimants upon the claimant's death, are not to the contrary. *See Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347 (1937). These so-called "death statutes" drafted in the early part of the century, were intended by Congress to continue any cause of action pending on behalf of the veteran without "abrogating or diminishing the then-existing cause of action for the use of his survivors." *See id.*

As this Court long ago held in the FELA context, the deceased claimant's cause of action is for his "personal loss and suffering before he died." By contrast, the survivors' claims are intended to compensate for their "pecuniary loss through his death." *See id.* Thus, statutory death provisions like § 5121 abrogate the harsh common law rule that federal statutory entitlements "personal" to the deceased were mooted upon death and could not therefore be adopted and pursued by the heirs or estate. As Justice Cardozo wrote for this Court, "[i]t would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied." *Id.* at 350-51. By reversing a 60-year old presumption in favor of claims survival, the Federal Circuit

returns to a policy that this Court concluded in 1936 had "had its day." *Id.* at 351.

B. VA Benefits Statutes Do Not Preclude Survival Of A Deceased Veteran's Pending Claims.

The Federal Circuit attempted to avoid the force of the usual presumption of claims survival by referring to two statutory provisions as evidence of congressional intent that veterans' claims abate upon death. But the VA statutes nowhere refer to such claim abatement—in fact the opposite, they explicitly permit veterans' benefits claims to survive their deaths.

The Federal Circuit, and CVA decision in *Landicho*, suggest that a veteran's pending claim is terminated by 38 U.S.C. § 5112(b)(1), an administrative provision that requires the VA to stop "payment" to a "payee" on the last day of the month before the payee dies. The Federal Circuit apparently reasoned that, because there can be no *payment* to a veteran on a claim after the veteran dies, there can be no surviving claim.

Had Congress intended this innocuous administrative provision to terminate all of a veteran's pending *claims* upon death, Congress would have employed the term "claim"[4] not "payment." The term "payments" cannot fairly be read to include "claims" in light of Congress' frequent and careful use of the word "claim" elsewhere in the VA benefits statutes. Indeed, § 5112 refers only to death of a "payee," not the death of a "claimant." Certainly the result imagined by the Federal Circuit and CVA—that veterans' pending, undecided claims are rendered moot by their deaths—cannot rest on such a slender reed as a provision that simply instructs the VA to stop sending checks to dead people.

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[4] The VA defines "claim" to mean an "application . . . for entitlement to Department of Veterans Affairs benefits" 38 C.F.R. § 20.3(f) (1996).

The CVA and Federal Circuit also suggest in tautological fashion that the very existence of § 5121 creates an overarching statutory scheme in which a veteran's pending, undecided claim cannot survive his death. The court reasons that nobody can be paid on a deceased veteran's claim unless first qualified under § 5121. In the courts' view, the death of the veteran somehow "converts" the veteran's pending claim from one for service-connected disability benefits (payable only to the veteran) into a new and different claim for accrued benefits (payable to qualified survivors). "[A]fter a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits." Pet. App. 14a.

It is true that the accrued benefits applicant must be eligible under § 5121 in order to receive *payment* of accrued benefits. The VA must determine whether the applicant properly belongs to one of the classes of survivors entitled by § 5121 to receive the veteran's due and unpaid benefits (*e.g.*, widow, children, parents). The mere existence of this separate administrative claims procedure, however, in no way requires that the veteran's pending CVA appeal must be *dismissed* upon his death. To the contrary, because accrued benefits claimants' rights under § 5121 depend entirely on "existing ratings or decisions" or "evidence in the file at date of death," § 5121 appears to permit, if not require, final adjudication and the exhaustion of appellate rights with respect to the merits of the veteran's underlying claim for benefits.

II. THE FEDERAL CIRCUIT WRONGLY DECIDED THAT ACCRUED BENEFITS CLAIMANTS ARE PRECLUDED FROM CHALLENGING DECISIONS PREVIOUSLY RENDERED AGAINST THE VETERAN.

Closely related to the Federal Circuit's holding that a veteran's disability claim does not survive his death is its further holding that an accrued benefits claimant is collaterally estopped from raising issues that were part of the veteran's

appeal pending at his death. As the Federal Circuit recognized, an accrued benefits claim is separate and distinct from the veteran's claim for service-connected benefits. Section 5121 requires the VA to distribute to qualified survivors any monies determined to be "due and unpaid" the veteran and to conduct for such survivors a fresh review of the evidence contained in the veteran's file. Because this review is limited to evidence already contained in the file, § 5121 does not permit the accrued benefits applicant to supplement the evidence in the veteran's file. Section 5121 thus offers a limited exception to VA finality rules, giving the veteran's survivors a chance to obtain review of a veteran's disability claim, usually in situations where the veteran has no claim pending at his death.

The Federal Circuit nonetheless held that an accrued benefits claimant is precluded from raising issues decided against the veteran during his lifetime unless the accrued benefits claimant can point to new and material evidence in the veteran's file. The court's decision thus accords collateral estoppel effect to prior adverse VA decisions—including adverse decisions on appeal at his death. This Catch-22 effectively prohibits merits adjudication on behalf of the accrued benefits claimant and virtually ensures denial of any such accrued benefits claim.

A. VA Statutes Permit Reconsideration Of Finally Decided Claims On Behalf Of The Accrued Benefits Claimant.

Section 5121 requires the VA to review whether there are benefits "due and unpaid" the veteran under "existing ratings or decisions, *or those based on evidence in file at date of death*." 38 U.S.C. § 5121 (emphasis added). Under the plain terms of § 5121, the VA must review whether an existing rating or decision supports an award of accrued benefits or whether there is "evidence on file at date of death" supporting such an award. Because of the statutory restriction that the evidence supporting the claim must be "on file at date of

death," surviving spouses may not "present" new and material evidence to the VA relating to the issue of service connection.

Section 5121 requires the VA to reconsider all evidence in the veteran's file, including prior adverse decisions, on behalf of the accrued benefits applicant. Under the Federal Circuit's reading of § 5121 in conjunction with VA statutes regarding claim finality, however, the *only* method for an accrued benefits applicant to obtain reconsideration of evidence in the veteran's file is to present, or otherwise identify, new and material evidence in the veteran's file supporting a reopening of some claim previously denied the veteran. Pet. App. 11a. As illustrated by Mrs. Zevalkink's case, such new and material evidence can *never* be identified by the accrued benefits claimant because such evidence, having been filed prior to the veteran's death and previously reviewed by the VA, is by definition no longer "new."

The Federal Circuit is simply wrong in suggesting that the only way an accrued benefits claimant may obtain a VA review of the veteran's file is by submitting new and material evidence. In reaching this conclusion, the court ignores numerous other statutes and regulations providing the VA broad authority to review evidence in the veteran's file, including previously denied claims, on behalf of the accrued benefits claimant. For example, the BVA may reverse any prior final decision to correct "obvious error," 38 U.S.C. § 7103(c); it may reconsider decisions at any time and award previously disallowed benefits, 38 U.S.C. § 7103(a); it may grant previously disallowed benefit claims after a change in law or administrative issue, 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a); it can correct a rating decision when a "clear and unmistakable error" is shown to exist or can amend an earlier decision when there is a "difference of opinion," 38 C.F.R. § 3.105(a), (b); and it may vacate any prior BVA decision if it determines that due process has been violated, 38 C.F.R. § 20.904.

The Federal Circuit's exceedingly narrow interpretation of § 5121 lends unprecedented collateral estoppel effect to informal VA adjudications in which the party against whom such estoppel is asserted had no notice or opportunity to participate. This conflicts with both the VA statutes and regulations, which extend the burden of finality only to claims where a *claimant* for VA benefits files a *claim*; that claim is denied; notice of denial is provided to the claimant; and the claimant exhausts appellate rights. For example, because Mrs. Zevalkink did not file her husband's claim, was not the party on that claim and could not file a notice of disagreement or appeal with respect to her husband's claim, none of the statutes or regulations that impose finality on claimants apply against *her*.[5] She was not (and could not be) a party to the VA's adjudication of her husband's claim while he lived.

Although Mrs. Zevalkink's claim for accrued benefits is factually derivative of her husband's prior claims, *it* cannot by definition be considered final until *its* merits have been decided. By requiring her to point to new and material evidence in the veteran's file as a prerequisite to obtaining a merits adjudication, the Federal Circuit improperly extends the statutory burden of finality to *her*. This contradicts what this Court once described as a process "designed to function throughout with a high degree of informality and solicitude for the claimant," and one where "a denial of benefits has no formal *res judicata* effect." *Walters*, 473 U.S. at 311.

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[5] *See also, e.g.*, 38 U.S.C. § 5104(a) (VA must provide notice to the claimant of its decision) 38 C.F.R. § 3.104 (Regional Office decision not final until "VA issues written notification"); 38 U.S.C. § 5104 (Regional Office must provide notice of any claim disallowance, including notice of the right to appeal and notice of the time limits for appealing to the BVA); 38 C.F.R. § 3.103(b) (same); 38 C.F.R. § 19.25 (same). Because no such notice was provided to Mrs. Zevalkink, her claim is not final.

In this regard, the Federal Circuit's reading of § 5121 departs substantially from accepted rules of statutory interpretation. For example, by adopting an interpretation that effectively nullifies the § 5121 provision regarding "evidence in the file at date of death," the Federal Circuit fails to give effect to all parts of the statute. *See, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633-34 (1973); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961). The court also ignores the important policies behind § 5121 in derogation of its duty to "'look to the provisions of the whole law, and to its object and policy.'" *U.S. National Bank of Oregon v. Independent Ins. Agents of Am. Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, (8 How.) 49 U.S. 13, 122 (1849). *Accord Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

The veterans benefits statutes are, as this Court has recognized, remedial in nature. *See, e.g., Brown v. Gardner*, 513 U.S. 115 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991); *Coffey v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980). The system is designed to be more concerned with the provision of benefits to those entitled to them than imposing "finality" upon claimants. *See Walters*, 473 U.S. at 311 (the VA benefits system is designed to operate with "no formal *res judicata* effect."). By adopting the narrowest possible reading of § 5121, the Federal Circuit ignored the general rule that exceptions, exclusions or conditions to remedial enactments are to be read as narrowly as possible. *See Tcherepnin v. Knight*, 389 U.S. 332 (1967).

B. The Federal Circuit's Decision Results In A Violation Of Petitioners' Fifth Amendment Due Process Rights.

The Federal Circuit's flawed interpretation of the VA statutes generally and § 5121 in particular violates petitioners' due process rights. Under the court's construction of § 5121, an accrued benefits applicant is granted access only to a

meaningless administrative process *after* she has been forced to abandon the veteran's appeal in which the merits of that claim were ripe for decision. Contrary to the Federal Circuit's assurance that "[t]he administrative and appellate procedures available to [such a survivor] on her separate claim ensure that she will not suffer injury," she is collaterally estopped at the agency from challenging issues previously central to that appeal. More importantly, even if completely successful in the accrued benefits process, she will be entitled under long standing VA practice only to *two years' worth* of the benefits determined to have been "due and unpaid" the veteran.

This Court has firmly established the principle that the Due Process Clause prevents the government from denying potential litigants the use of established adjudicatory procedures, "when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (citations omitted). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). These protections extend to litigants before the federal courts as well as before government agencies. *See Logan*, 455 U.S. at 428; *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

Even if the CVA were correct in dismissing Mr. Hesse's ripe CVA appeal in favor of a later administrative hearing for Mrs. Hesse, there is no assurance that the administrative hearing available to Mrs. Hesse would protect her against an erroneous deprivation of benefits due her husband.[6]

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[6] Although petitioners had not yet proven actual entitlement to benefits because the facts proving service connection had not been established by the agency, they do have legally protectible interests in hearing procedures

(continued...)

The administrative procedures granted to an accrued benefits applicant pale in comparison to the procedures and potential recovery to which the veteran would be entitled before he died. A veteran who obtains a favorable CVA decision is thus eligible to obtain benefits retroactive to the date he first filed the claim for benefits at issue. 38 U.S.C. § 5110(a). In contrast, his surviving spouse may receive a *maximum* of two-years' benefits, solely because of her status as an accrued benefits claimant. Similarly, a veteran may contest the factual and legal bases of a final BVA decision before the CVA. The surviving spouse, by contrast, may not contest the same, or even similar, issues that the veteran had previously argued on appeal.

When a "statutory scheme makes liability an important factor in the State's determination . . . the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S. 535, 541 (1971). Because this administrative process does not afford petitioners "'the right to support [their] allegations by argument however brief, and, if need be, by proof, however informal,'" it violates due process. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 n.17 (1978) (quoting *Londoner v. Denver*, 210 U.S. 373, 386 (1908)). In short, the Federal Circuit has interpreted relevant VA law to require an administrative hearing procedure that is devoid of substance—an exercise in futility.

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[6] (...continued)
provided by statute and regulation. *See Logan*, 455 U.S. at 430 n.5.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT L. NELSON
General Counsel
MICHAEL P. HORAN
Associate General Counsel
KAREN B. LEVIN
PARALYZED VETERANS OF AMERICA
801 Eighteenth Street, N.W.
Washington, D.C. 20006-3717

EDWARD W. WARREN
Counsel of Record
CHRISTOPHER A. COLE
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioners

Dated: March 17, 1997

APPENDIX A

United States Court of Appeals for the Federal Circuit

94-7101

OPHEL H. ZEVALKINK,
Claimant-Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,
Respondent-Appellee.

95-7012

ELEANOR M. HESSE,
Claimant-Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: December 17, 1996

Before ARCHER, Chief Judge, and MICHEL, Circuit Judges.

ARCHER, Chief Judge.

The issue in No. 7101 is whether a claimant under 38 U.S.C. § 5121 (1994), for a decreased veteran's accrued benefits, must present new and material evidence to reopen the veteran's previously denied claim for benefits, and the issue in No. 95-7012 is whether such a claimant has standing to be substituted for a deceased veteran in the prosecution of the

veteran's claim for benefits pending at the date of death before the Court of Veterans Appeals. These cases have been consolidated for purposes of disposition.

We affirm the holding of the Court of Veterans Appeals that new and material evidence is required to reopen a previously denied claim. We also affirm its decision refusing to substitute a claimant under § 5121 for the deceased veteran in a pending proceeding before the Court of Veterans Appeals.

BACKGROUND

A. In No. 94-7101, Mr. Zevalkink, a World War II veteran, had pursued a claim for service connection for a kidney disorder prior to his death. That claim was denied in a decision dated April 19, 1985, by the Board of Veterans' Appeals (BVA or Board).

After the death of her husband, Ophel H. Zevalkink (Mrs. Zevalkink), as surviving spouse, filed a claim with the Los Angeles, California Regional Office (RO) of the now Department of Veterans Affairs (VA) for accrued benefits under 38 U.S.C. § 5121(a). Mrs. Zevalkink asserted that her husband had been entitled, at the time of his death, to an award of service connection for a kidney disorder.[1]

On August 2, 1989, the RO denied Mrs. Zevalkink's claim for accrued benefits on the basis that no new information had been submitted since the last hearing on Mr. Zevalkink's claim. The RO also stated that "[a] review of the evidence in file does not show [service connection] for any of the conditions on appeal, hence the prior denial [sic] are confirmed & continued."

Similarly, in a June 1991 decision, the BVA agreed with the RO's determination that no new and material evidence had been submitted since the 1985 denial of Mr. Zevalkink's claim

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[1] Certain other physical conditions were alleged to have been service connected but have been pursued and are not at issue here.

for service connection for a kidney disorder and that, as a result, the claim could not be reopened. The Board stated that "[i]n order to now establish entitlement to service connection for kidney disability, there must be new evidence which is relevant and material and which establishes a basis for service connection for kidney disease."

Mrs. Zevalkink then appealed to the Court of Veterans Appeals which, in an in banc decision, affirmed the BVA. Zevalkink v. Brown, 6 Vet.App. 483, 488-89 (1994).[2] The court agreed with the BVA's determination that Mrs. Zevalkink had to show the presence in her husband's file of "new and material evidence" relating to the kidney disorder in order to pursue her claim for accrued benefits under § 5121 based on that condition. Id. at 489. The court reasoned that this conclusion was required to give meaning to all parts of the statute and to harmonize § 5121 with other statutory provisions such as 38 U.S.C. 7104(b) and 5108 (1994), regarding the finality and reopening of VA benefit claims. Id. at 491.

Mrs. Zevalkink has appealed the Court of Veterans Appeals' determination that new and material evidence is

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[2] In order for the Court of Veterans Appeals to have jurisdiction over an appeal from the BVA, the claimant must have filed a notice of disagreement (NOD) with the RO with respect to that claim on or after November 18, 1988. Veterans' Judicial Review Act, Pub.L. No. 100-687, 301(a), 102 Stat. 4113 (1988), renumbered Pub.L. No. 102-40, § 402 (d)(2), 105 Stat. 238 (1991) (see 38 U.S.C. § 7251 note); see also Hamilton v. Brown, 39 F.3d 1574, 1576 (1994). In this case, the Court of Veterans Appeals held that Mrs. Zevalkink's accrued benefits claim, while derivative of her deceased husband's disability claim, was a separate claim. Because Mrs. Zevalkink filed a NOD as to the RO's denial of this accrued benefits claim, the court determined, sua sponte, that it had jurisdiction in this case.

required for a claimant under § 5121 to reopen a deceased veteran's claim.

B. In No. 95-7012, Eleanor M. Hesse's (Mrs. Hesse) claim for accrued benefits under § 5121 is based on the claim of her husband, Burt Hesse, for disability benefits for chronic obstructive pulmonary disease, which was pending before the Court of Veterans Appeals at the time of his death. Mr. Hesse first applied for benefits in 1976. The RO and the BVA denied his claim in decisions dated February 8, 1977 and November 21, 1977, respectively. Mr. Hesse attempted to reopen his claim at least eight times between 1978 and 1988, each time submitting additional documentation or testimony. In 1984, Mr. Hesse submitted and relied on a 1945 letter awarding him service connection and 10% compensation for a "lung condition." In all instances, however, the BVA refused to reopen Mr. Hesse's claim. The BVA's last decision relating to Mr. Hesse's attempts to reopen his claim was on April 17, 1990. See Hesse v. Derwinski, 2 Vet.App. 359, 360-61 (1992) (detailing the procedural history of Mr. Hesse's claim for service connection).

Mr. Hesse sought review of this last BVA decision by the Court of Veterans Appeals.[3] While this appeal was pending, however, Mr. Hesse died. After his death, the Court of Veterans Appeals, as was then its practice, see Landicho v. Brown, 7 Vet.App. 42, 47 (1994), substituted Mrs. Hesse as appellant in Mr. Hesse's appeal under Rule 43(a) of its Rules of Practice and Procedure.

With Mrs. Hesse pursuing her husband's claim, the Court of Veterans Appeals found, in a decision dated April 22, 1992, that the BVA had not adequately supported its findings and

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[3] The Court of Veterans Appeals was established in 1988 pursuant to the Veteran's Judicial Review Act, § 301(a), renumbered § 402 (codified as amended at 38 U.S.C. §§ 7251-56, 7261-69, 7281-86, 7291-92, 7298-98).

conclusions, and remanded the case to the BVA. Hesse, 2 Vet.App. at 361. The court specifically asked the BVA to consider whether Mr. Hesse was entitled to benefits based on the 1945 letter or why that letter was not probative. On remand, the BVA again determined that no new evidence was present to justify reopening Mr. Hesse's claim. As to the 1945 letter, the BVA stated that its authenticity had not been proven under the best evidence rule and, therefore, refused to consider whether this letter established that the VA had granted Mr. Hesse service connection for a lung disorder rated at 10% disabling.

Mrs. Hesse again appealed to the Court of Veterans Appeals. At this time, however, the Court of Veterans Appeals had pending before it two cases: Zevalkink discussed above, and Landicho v. Brown, 7 Vet.App. 42 (1994). In Landicho the Court of Veterans Appeals reconsidered its admittedly routine practice of permitting substitution under the court's Rule 43(a).

Rule 43(a)(2) provided:

> After Notice of Appeal. If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a), the personal representative of the deceased party's estate, or any other appropriate person may be substituted as a party on motion by such person or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

The court decided that a party claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a) could not be substituted for a deceased veteran in a pending proceeding involving the

veteran's claim for disability compensation.[4] Landicho, 7 Vet.App. at 53-54.

The court reasoned that a veteran's disability compensation claim does not survive the veteran's death because under 38 U.S.C. § 5112(b) (1994), disability compensation is terminated on the last day of the month before the date of death. Id. at 47. As a result, the court concluded that no claim is pending at the time of the veteran's death as to which any party may be substituted. Id. The court pointed out that, although an accrued benefits claim may depend on the veteran's entitlement to unpaid disability compensation, it is a separate claim from the disability claim. Id.

The court then considered, given the separateness of the claims, whether for a claimant under § 5121 there was a continuing "case or controversy" and whether such a claimant would have standing to pursue the pending appeal. Id. at 48-49. The court determined that because there had been no adjudication as to whether the person to be substituted for the deceased veteran would be qualified under § 5121 to receive accrued benefits, any decision the court might render on service connection would be purely hypothetical. Id. The court also determined that a § 5121 claimant would not be "adversely affected" by an outstanding BVA decision because the § 5121 claimant's action is separate and distinct from the deceased veteran's BVA proceeding. Id. at 53.

Thus, in Landicho, the Court of Veterans Appeals decided it did not have jurisdiction to decide the merits of a deceased veteran's disability claim after the veteran's death and that, as a result, an accrued benefits claimant could not be substituted in a proceeding on a deceased veteran's claim. The court then

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[4] The court did not address the propriety of substituting the other entities described in Rule 43(a), such as the personal representative of the veteran's estate, and we take no position on that issue in this appeal.

amended its Rule 43(a)(2) so that accrued benefits claimants are not entitled to be substituted in the pending case of a deceased veteran.

Recognizing that both Zevalkink and Landicho were pertinent to and dispositive of Mrs. Hesse's case, the parties jointly requested that the Court of Veterans Appeals dismiss her appeal on the basis of those controlling cases. The Court of Veterans Appeals granted the dismissal, Hesse v. Brown, No. 90-763 (Vet.App. Oct. 26, 1994), and Mrs. Hesse now appeals to this court.[5]

DISCUSSION

This court's jurisdiction to review decisions of the Court of Veterans Appeals is limited. 38 U.S.C. § 7292 (1994). We are authorized to "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof. . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). Except to the extent that a constitutional issue is present, we may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case. 38 U.S.C. § 7292(d)(2); see Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996). The Court of Veterans Appeals' interpretation of the requirements of § 5121 and other statutory provisions as well as the question of whether the

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[5] Mrs. Hesse also presents arguments on appeal directed to the question of whether new and material evidence is required under § 5121, the same question raised in Mrs. Zevalkink's appeal. However, because of our holding on the question of whether she may be substituted for her husband in the pending case before the Court of Veterans Appeals, we will not consider the new and material evidence arguments by Mrs. Hesse except to the extent they are also disposed of in Mrs. Zevalkink's case.

statutory scheme permits substitution are, therefore, within our jurisdiction.

I. Jurisdiction

The Secretary challenges Mrs. Hesse's right to appeal in this case because "the order of the [Court of Veterans Appeals] dismissing her claim did not state Ms. Hesse sought to preserve any of her rights to appeal the dismissal" and, as a result, "there exists no case or controversy for Ms. Hesse to bring before the Court on appeal because Ms. Hesse voluntarily sought and obtained a dismissal of her appeal to the [Court of Veterans Appeals]." We find this argument quite surprising in view of the fact that the parties jointly stipulated to the dismissal because of the Board's decisions in Landicho and Zevalkink and stated that" [b]oth parties recognize that if the Court grants this Motion and enters judgment, Appellant will immediately appeal the judgment to the United States Court of Appeals for the Federal Circuit and seek to consolidate her action with the pending Zevalkink appeal."

In its October 26, 1994 order dismissing Mrs. Hesse's action, the court specifically referenced the parties' joint motion for dismissal and appellant's concession that dismissal was required under the court's decision in Zevalkink and Landicho. It is clear that the court dismissed Mrs. Hesse's case because of those decisions, which Mrs. Hesse intended to contest in an appeal to this court. Further, Mrs. Hesse thereafter filed and the court granted an unopposed motion to recall the mandate, which she noted had been issued prematurely in view of her appeal. Accordingly, we conclude that Mrs. Hesse preserved her right to appeal, and we find no jurisdictional infirmity.

II. New and Material Evidence

Section 5121 specifies that certain accrued benefits to which a veteran was entitled at the time of the veteran's death will be paid. Specifically, § 5121 provides:

> periodic monetary benefits (other than insurance and servicemen's indemnity) under

> laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death. . . and due and unpaid for a period not to exceed one year, shall, upon the death of such individual be paid. . . .

38 U.S.C. § 5121(a). The statute then delineates the order of preference in paying out such benefits. See 38 U.S.C. § 5121(a)(1)-(5).

Under the statutory scheme, claims for benefits are first filed with the RO. The decision of the RO may be appealed to the BVA after filing a notice of disagreement (NOD) with the RO within one year of the decision. 38 U.S.C. § 7104; 38 C.F.R. § 20.302(a). Once the BVA has issued a final decision, the statute provides in 38 U.S.C. §§ 7104 and 5108, that the BVA may not reconsider and allow a claim which it has previously disallowed unless new and material evidence is presented. Barnett v. Brown, 83 F.3d 1380, 1384 (Fed. Cir. 1996). Specifically, § 7104 says that "[e]xcept as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." Section 5108 directs the Secretary to reopen a previously disallowed claim if new and material evidence is presented.

Appellants argue that the Court of Veterans Appeals' requirement that they produce new and material evidence in seeking accrued benefits under § 5121 contradicts the language of that section which provides that accrued benefits may be determined "based on evidence in the file at date of death." Appellants argue that their claims are separate from their husbands' claims, as the Court of Veterans Appeals recognized when it held that appellants must file their own NODs, and that those claims should be treated and analyzed separately based on all evidence in the file. Appellant's further contend that

§§ 7104 and 5108 regarding the finality and the reopening of claims, while applicable to claims made by their deceased husbands, do not apply to them because their claims made by their deceased husbands, do not apply to them because their claims have never been finally decided.

We disagree. A claim for accrued benefits under § 5121, as the Court of Veterans Appeals correctly held, is a separate claim from the veteran's claim for service connection because it is based on a separate statutory entitlement for which an application must be filed in order to receive benefits. See 38 U.S.C. § 5121(c) ("Applications for accrued benefits must be filed within one year after the date of death."). At the same time, however, an accrued benefits claim is derivative of the veteran's claim for service connection, i.e., the claimant's entitlement is based on the veteran's entitlement. Section 5121 provides direction on how to apply for accrued benefits which were "due and unpaid" to the veteran at the time of death and to whom the benefits are to be paid. Under § 5121, therefore, a claimant is only entitled to what was properly due the veteran at the time of death, but which was unpaid.

The language in § 5121 relied on by appellants to urge reversal bears this out. Contrary to appellants' argument, § 5121 does not entitle the claimant to a readjudication of the veteran's claim. Rather, it shows that the accrued benefits claim is derivative of the veteran's claim. Thus, the main thrust of the statute is to pay benefits that were "due and unpaid" to the veteran based on "existing ratings or decisions." 38 U.S.C. § 5121.

If the existing decisions were adverse, then no benefits are payable. While living, the veteran was bound by those existing decisions and could not have had them reconsidered absent new and material evidence. Sections 5108 and 7104 of title 38 expressly preclude the RO and BVA from considering a prior adjudication claim unless new and material evidence is presented. See Barnett, 83 F.3d at 1384.

Appellants have presented no compelling argument, nor pointed to any statutory language, showing why existing ratings and decisions should be reopened without such new and material evidence. Appellants argue, in effect, that the clause which states that accrued benefits may be "based on evidence in the file at date of death" allows them to reopen, and have a new adjudication of, any existing decision or rating. As shown, however, this would be inconsistent with the other provisions of § 5121 and with the central purpose of the statute which is to pay accrued benefits based on "existing ratings and decisions." Thus, we interpret the clause relied on by appellants as permitting the new adjudication of a prior claim only if there is new and material evidence in the file which has not previously been considered.

Appellants argue that this interpretation would violate the Due Process Clause of the U.S. Constitution because it binds them to decisions rendered through a procedure in which they were not allowed to participate. As discussed above, however, the accrued benefits claim is derivative of the veteran's claim and, by statute, the claimant takes the veteran's claims as they stand on the date of death, i.e., based on existing ratings and decisions and based on any new and material evidence in the file that has not previously been considered. Before the veteran's death, of course, the claimant has no claim and, thus, no process rights.

Finally, appellants argue that the VA's own regulation, 38 C.F.R. § 20.1106, requires the BVA to consider their claims without regard to any prior adjudication of the underlying claims. In this regard, they rely on the § 20.1106 provision that "issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime." The Secretary counters that the term "death benefits" in the regulation, as in 38 U.S.C. § 5310 (1994), refers to death compensation in chapter 11, dependency and indemnity compensation in chapter 13, and death pension in chapter 15, all of title 38, which are continuing, periodic

benefits based on the beneficiary's statute as the veteran's spouse and does not refer to accrued benefits. Accrued benefits, by contrast, are sums owing to the veteran for prior periods, but unpaid at the time of death. Because accrued benefits are based on the veteran's own entitlement, the Secretary says they are not properly classified as "death" benefits.

The Court of Veterans Appeals correctly determined that the Secretary's interpretation of its regulation was not unreasonable. Although the VA regulations do not define the term "death benefits," that term is used in 38 U.S.C. § 5310. Section 5310 refers to the surviving spouse's entitlement "to death benefits under chapter 11, 13, or 15 of this title" (emphasis added) and provides how those benefits are to be paid. The accrued benefits statute, in contrast, appears in chapter 51 of title 38, entitled "Claims, Effective Dates, and Payments," and relates to the payment of benefits previously "due and unpaid." We see nothing inconsistent with the statute in the Secretary's interpretation of the regulatory use of the term "death benefits." Accrued benefits are amounts "due and unpaid" prior to the veteran's death and are not in the nature of death benefits of the type referred to in 38 U.S.C. § 5310.

III. Substitution

Appellant Hesse argues that the Court of Veterans Appeals, in refusing to allow her to continue prosecuting her husband's claim, has applied an unduly restrictive and formalistic approach to its jurisdiction and the requirement of a "case controversy." This is especially true, according to Mrs. Hesse, because the Court of Veterans Appeals is an Article I court, and the Article III justiciability limitations it adopted are not constitutionally required. Mrs. Hesse urges that the Court of Veterans Appeals has flexibility in determining what constitutes a justiciable controversy and should not have ruled the way it did.

Mrs. Hesse also contends that the court erred in determining that a claim for service connection does not

survive a veteran's death. She argues that 38 U.S.C. § 5112(b)(1) merely provides for termination of "payments" to the veteran upon the veteran's death and does not affect the survival of the underlying claim for benefits. As to that underlying claim, Mrs. Hesse argues that it must survive since it is explicitly referred to in § 5121 establishing accrued benefits. Moreover, Mrs. Hesse asserts that she has standing to pursue her husband's claim because her claim is factually and procedurally dependent on her husband's claim and she, thus, would be injured if she were forced to start all over again.

The Secretary counters each of Mrs. Hesse's arguments. In particular, the Secretary contends that mere administrative delay is not sufficient injury to confer standing upon Mrs. Hesse and that the BVA decision, which gave rise to the appeal to the Court of Veterans Appeals, was rendered a nullity by her husband's death. Accordingly, Mrs. Hesse's claim can be decided following the normal administrative procedures without regard to that decision.

We conclude that the Court of Veterans Appeals did not err in determining not to allow Mrs. Hesse to be substituted in the prosecution of her husband's claim for service connection.

As a court established under Article I of the U.S. Constitution, the Court of Veterans Appeals is not bound to the "case or controversy" requirement of Article III. However, it has decided, based on the same prudential considerations behind the "case or controversy" requirement, i.e., courts should only decide real and substantial controversies, not hypothetical claims, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937), that it would refrain from deciding cases that do not present an actual case or controversy. Mokal v. Derwinski, 1 Vet.App. 12, 13 (1990).

Generally, the requirement that a party have "standing" to appear before a court is intended to ensure that the court is deciding a real "case or controversy." See Warth v. Seldon, 422 U.S. 490, 498 (1975). To have standing a party must have suffered some actual or threatened injury. Warth, 422 U.S. at

499. Under 38 U.S.C. § 7266(a) (1994), a party must be "adversely affected" by a decision of the Board in order to appeal to the Court of Veterans Appeals. The Court of Veterans Appeals considers this a "standing" requirement and that a party must, therefore, show some actual or threatened injury. Landicho, 7 Vet.App. at 49.

We agree with the Court of Veterans Appeals that Mrs. Hesse is not "adversely affected" by its refusal to permit substitution. As discussed above, an accrued benefits claim is separate from the veteran's underlying claim for service connection and disability compensation. Section 5121 specifies that an accrued benefits claimant must file an application for benefits within one year after the date of death of the veteran. VA regulations define claim or application as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1 (1996). The initial determination on a claim is made by the agency of original jurisdiction, in this case the RO, 38 C.F.R. § 20.3(a)(1996), and not the Court of Veterans Appeals. After an initial decision, an appeal may only be taken after the issues have been framed by the filing of a NOD with the RO. See 38 U.S.C. § 6194. Indeed, an accrued benefits claimant must file a separate NOD with the RO to initiate appellate review. Payment on a veteran's disability compensation claim, on the other hand, terminates on the last day of the month before the veteran's death. 38 U.S.C. § 5112(b)(1). Thus, after a veteran's death, the claim is no longer one for disability compensation but rather one for accrued benefits. The administrative and appellate procedures available to Mrs. Hesse on her separate claim ensure that she will not suffer injury by the Court of Veterans Appeals' decision to deny substitution. Any delay inherent in pursuing her own claim, when this procedure is established by statute, does not constitute the kind of actual or threatened injury that confers standing. See Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 108

(D.C. Cir. 1986) (stating that the time required to pursue an administrative remedy does not constitute irreparable injury such as would excuse a claimant from exhausting administrative remedies).

In this case, the Court of Veterans Appeals also determined that Mrs. Hesse must pursue her claim for accrued benefits separately from her husband's claim in part because her status as the appropriate claimant had not been adjudicated. Section 5121 lists a number of potential accrued benefits claimants such as the veteran's spouse, children, or parent or the person who bore the expense of burial. Thus, the determination of whether a party qualifies as an accrued benefits claimant necessarily involves fact finding. The Court of Veterans Appeals is not a trier of fact and is not in a position to make such factual determination. While the Court of Veterans Appeals could perhaps remand the question of whether Mrs. Hesse qualifies as an accrued benefits claimant to the RO, we will not require the Court of Veterans Appeals to make such a limited referral. By following the established administrative course of filing a claim with the RO, both the question of Mrs. Hesse's status as the § 5121 claimant, as well as the merits of her claim, can be considered together. If that decision should be adverse, it can be appealed with a full record to the BVA and to the courts.

Thus, we cannot conclude that the Court of Veterans Appeals erred in refusing to substitute Mrs. Hesse in the prosecution of her husband's claim and in requiring Mrs. Hesse to file her own claim for accrued benefits.

CONCLUSION

We conclude that the Court of Veterans Appeals correctly determined that an accrued benefits claimant under 38 U.S.C. § 5121 must point to new and material evidence in the veteran's file to re-open the veteran's claim for benefits which has previously been finally decided. We therefore affirm the Court of Veterans Appeals' judgment in No. 94-7101. Moreover, because an accrued benefits claimant is required to file a

separate claim for benefits, we affirm in No. 95-7012 the Court of Veterans Appeals' dismissal of Mrs. Hesse's case.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF VETERANS APPEALS
No. 91-1683

OPHEL H. ZEVALKINK, APPELLANT,
V.
JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellant's Motion for Reconsideration

(Decided Jun - 2 1994)

Michael P. Horan was on the pleadings for the appellant.

James A. Endicott, Jr., General Counsel, *David T. Landers*, Acting Assistant General Counsel, *R. Randall Campbell*, Deputy Assistant General Counsel, and *Amanda Linn Cashion* were on the pleadings for the appellee.

Before NEBEKER, *Chief Judge*, and KRAMER, FARLEY, MANKIN, HOLDAWAY, IVERS, and STEINBERG, *Judges*. STEINBERG, *Judge*, filed the opinion of the Court. MANKIN, *Judge*, concurred in the result.

STEINBERG, *Judge*: The appellant, widow of World War II veteran James B. Zevalkink, appealed pro se from a June 10, 1991, decision of the Board of Veterans' Appeals (BVA or Board) denying her claim for accrued benefits under 38 U.S.C. § 5121(a). *Ophel H. Zevalkink*, BVA 91-19719 (June 10, 1991). The Secretary of Veterans Affairs (Secretary) filed a motion for summary affirmance. Because this case presents legal issues of first impression, single-judge disposition is not appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). The Secretary's motion will be denied and the Court will affirm the BVA decision.

On August 17, 1993, a panel of the Court issued an opinion in this case affirming in part and vacating in part the BVA decision and remanding the matter to the Board for readjudication. On September 27, 1993, the appellant, pro se, filed correspondence which the Court construed as an out-of-time informal motion for reconsideration of its decision. On October 6, 1993, the Court ordered the Secretary to respond to the appellant's motion. On October 26, 1993, Michael P. Horan, Esq., of the Paralyzed Veterans of America (PVA) filed an appearance as attorney for the formerly pro se appellant. Pursuant to the Court's order, on November 2, 1993, the Secretary filed a response to the motion for reconsideration. On January 3, 1994, the appellant, through counsel, filed an extensive reply to the Secretary's response. The Court is indebted to the PVA and Mr. Horan for the service they have performed in representing the appellant on the motion for reconsideration.

The motion for reconsideration, having been considered, sua sponte, by this Court en banc, is granted. The August 17, 1993, panel opinion is vacated, and this opinion is issued in its stead. The Court notes that this opinion differs in result from the vacated opinion only as to the issue of service connection for myalgia and rheumatism, although the analysis as to the nature of the accrued-benefits claim has been substantially revised.

I. Background

Certain survivors of a deceased veteran are eligible to receive payment from the Department of Veterans Affairs (formerly Veterans' Administration) (VA) of "accrued benefits" based upon the deceased veteran's statutory entitlement to such benefits. "Accrued benefits" are defined as:

> [P]eriodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on

> evidence in the file at date of death . . . and due and unpaid for a period not to exceed one year. . . .

38 U.S.C. § 5121(a). In the instant case, the appellant's claim for accrued benefits is based essentially upon claims that the veteran was entitled, based upon evidence on file with VA at the date of his death, to service connection for a kidney disorder, hypertension, myalgia, and arthritis.

The veteran had active service with the United States Army from February 16, 1943, to December 11, 1945. R. at 2. His service entrance and separation examinations were negative for any pertinent defects. R. at 6, 22-24. An April 1944 service medical record (SMR) (although an April 1987 regional office (RO) decision would later refer to this record as being from "4/42", the veteran did not enter service until 1943) refers to the veteran's having been treated for "myalgia, marked, . . . both thighs and legs", which was described as possibly rheumatic. R. at 134, 136, 209. The veteran's SMRs do not reflect any other in-service complaints or treatments pertinent to a kidney condition, hypertension, myalgia, or arthritis.

In September 1965, the veteran filed a claim for service connection for a kidney disorder. R. at 26-29. He stated that a kidney disorder had been noted at the time of his separation examination, and that service physicians had wanted to hospitalize him for that condition at that time but that he had refused treatment. R. at 27. After obtaining records of the veteran's treatment by private physicians in 1965 (R. at 30-38), none of which showed any treatment for kidney problems, a VARO denied the claim in December 1965. R. at 40.

Records of the veteran's private medical treatment in 1965 and 1969 indicate that the veteran had sustained a spinal injury in a 1963 occupational accident during the course of his employment as a carpenter. R. at 31-34, 37-38, 49-51. A report of a VA medical examination in October 1972 noted no kidney or other genitourinary disabilities. R. at 57. A June 1973 VA medical examination did not reveal any kidney

abnormalities (R. at 63), but a urinalysis at that time apparently revealed a high concentration of protein in the veteran's urine. R. at 71. The 1972 and 1973 VA examinations also noted that the veteran then suffered from back disabilities, including the residuals of a cervical spine fusion performed by a private physician in 1969 and chronic low-back strain. R. at 67-68. In a June 25, 1973, letter, a private neurologist, Dr. Lloyd A. Dayes, expressed a medical opinion that the veteran had incurred a kidney disorder during service. R. at 76.

In May 1984, the veteran filed a claim for service connection for a kidney disability. R. at 80-84. In September and October 1984 statements, the veteran and Mr. David Schwabauer, a former service colleague of the veteran's, stated that at their service separation examinations in December 1945 the veteran had provided a urine specimen for Mr. Schwabauer, who had been having difficulty producing one, and that both men's discharges were then delayed because of a problem with the specimens. R. at 90-91. The veteran further stated that in the 1960s he had been denied life insurance because of a kidney condition. R. at 88. In a November 19, 1984, decision, the VARO denied the claim. R. at 92. In an April 19, 1985, decision on appeal, the BVA denied service connection for the kidney disability. R. at 103-07.

On a January 1986 VA hospitalization report, the veteran was diagnosed with hypertensive heart disease, hypertensive nephropathy with renal insufficiency, and history of congestive heart failure. R. at 114-15. In February 1986 he submitted to the RO claims for service connection for a kidney disorder, congestive heart failure, hypertension, myalgia, and arthritis. R. at 120. The RO denied those claims in March 1986. R. at 121. In November 1986, the veteran submitted an additional statement from Mr. Schwabauer to the same effect as his prior statement. R. at 125. In March 1987, the veteran and his wife testified under oath at a hearing before the RO. R. at 127-33.

In April 1987, the RO disallowed the veteran's claims for service connection for "[r]enal insufficiency with hypertension"

and for "myalgia, lower extremities (claimed rheumatism)". R. at 134-35. The RO stated that "SMRs in 4/42 [sic] revealed acute myalgia, marked, both thighs [and] legs, questionably rheumatic", but that "[n]o other treatment or complaints [were shown] during [the] rest of service or on [his] discharge exam". R. at 134. On May 19, 1987, the veteran filed with the RO a Notice of Disagreement (NOD) with the April 1987 disallowance of his claims. R. at 140. In September 1988, the veteran and his wife submitted additional sworn testimony. R. at 163-69.

On December 7, 1988, the veteran died due to "cardiopulmonary arrest" as a consequence of "chronic renal failure". R. at 172. On December 22, 1988, the appellant filed a claim for, inter alia, accrued benefits based on claims that her husband had been entitled at his death to an award of service connection for a kidney disorder, hypertension, myalgia, and arthritis. R. at 174. On August 2, 1989, the RO denied the accrued-benefits claim. R. at 187. In a July 20, 1990, written "presentation" to the Board, the appellant's representative stated that "an appeal has been taken from a decision rendered by the [RO] in Los Angeles, California, which denied the issues [sic] in question". R. at 198.

On December 3, 1990, the BVA remanded the claim to the RO for correction of defects in the Supplemental Statement of the Case (SSOC) previously issued to the appellant. R. at 201. On remand, she submitted a statement, dated December 1986, from the veteran's brother that the veteran had had back and leg pain from arthritis at the time of his discharge from service and that in the 1950s he had experienced difficulty passing an insurance physical examination because of a kidney problem. R. at 212. The RO issued another decision disallowing the claim on December 19, 1990, and issued another SSOC on January 15, 1991. R. at 203-07. On January 30, 1991, the appellant filed with the RO a VA Form 1-9 (Appeal to BVA) expressing disagreement with the disallowance of her claim

and stating that she was appealing a January 15, 1991, RO decision. R. at 208.

In the June 1991 decision here on appeal, the Board denied the appellant's claim. The Board concluded that no new and material evidence had been submitted since the 1985 BVA denial of the kidney claim, and, therefore, denied reopening of that claim. *Zevalkink*, BVA 91-19719, at 8-9. In denying the claim as to hypertension, the BVA noted that the first evidence of hypertension was a borderline diastolic blood pressure reading on an October 1972 VA examination and that there was no evidence to link hypertension with the veteran's active service. *Id.* at 9-10. In denying the claim as to arthritis and myalgia, the BVA stated that "the service medical records are negative for those disorders", and that a musculoskeletal disability was not shown until many years after the veteran's military service and not until after his 1963 accident. *Id.* at 10.

II. Analysis

A. The Court's Jurisdiction Over the Kidney-Disorder Claim

Although neither party has raised the issue, the Court must first determine whether it has jurisdiction over the appealed claim. *See Phillips v. General Services Admin.*, 924 F.2d 1577, 1579 (Fed. Cir. 1991); *Fugere v. Derwinski*, 972 F.2d 331, 334 n.5 (Fed. Cir. 1992); *Noll v. Brown*, 5 Vet.App. 80, 82 (1993); *Hamilton v. Brown*, 4 Vet.App. 528, 541 (1993) (en banc). In order for this Court to have jurisdiction over a claim on appeal from an adverse BVA decision, a claimant or his or her representative must have filed with an RO a valid NOD with respect to that claim on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note) (VJRA § 402); *see Hamilton*, 4 Vet.App. at 531. Furthermore, *Hamilton* held: "There can be only one valid NOD as to a particular claim until a ***final*** RO or BVA decision has been rendered in that matter, or the appeal has been withdrawn by the claimant." *Hamilton*, 4 Vet.App. at 538. To be valid for any purpose, an

NOD must be in writing and must be filed by the claimant or his or her representative within one year after "the date of mailing of notice of the result of initial review or determination". 38 U.S.C. § 7105(b)(1); *see Rowell v. Principi*, 4 Vet.App. 9, 15 (1993). A BVA remand decision "is in the nature of a preliminary order and does not constitute a final Board decision." 38 C.F.R. § 20.1100(b) (1993).

Here, the veteran filed an NOD in May 1987 as to the RO's disallowance of his claims for service connection for a kidney disorder, hypertension, myalgia, and arthritis. R. at 140. Those claims were pending on appeal to the BVA pursuant to that NOD at the time of the veteran's death in December 1988. Therefore, if the appellant's claim, filed on December 22, 1988, for accrued benefits predicated upon service connection for those four conditions was merely a continuation of the veteran's claims for service connection for those conditions, then the appellant could not have filed an additional valid NOD as to those claims, so as to give this Court jurisdiction over them, while they were in appellate status. If, however, the appellant's accrued-benefits claim is a claim different from the veteran's claims for service connection that were pending on the date of his death, then the appellant would have been able to file a valid NOD as to that claim after November 18, 1988, and, hence, give this Court jurisdiction over that claim. For the reasons stated below, the Court holds that an accrued-benefits claim is a claim different from the service-connection claims of the veteran from whose service the former claim is derived, and, therefore, that the appellant here was required to file an NOD as to the accrued-benefits claim in order to initiate review by the BVA, and ultimately this Court, of that claim.

Pursuant to 38 U.S.C. § 5121(c), an application for accrued benefits must be filed "within one year after the date of [the veteran's] death". *See also* 38 C.F.R. § 3.1000(c) (1993). Although the appellant's claim for accrued benefits is related to the veteran's claims, during his lifetime, for service-connected disability benefits under 38 U.S.C. § 1110,

entitlement to accrued benefits arises under 38 U.S.C. § 5121(a) and is predicated upon an accrued-benefits application filed ***after*** the veteran's death. *See Cates v. Brown*, 5 Vet.App. 399, 400 (1993). It would be anomalous to hold that a May 1987 NOD could apply to claims which could not have been filed prior to December 7, 1988.

The appellant's accrued-benefits claim was filed on December 22, 1988 (R. at 174), and was initially disallowed by the RO on August 2, 1989 (R. at 187). The July 20, 1990, written "presentation" to the Board from the appellant's representative (R. at 198) might constitute a valid NOD with respect to the August 2, 1989, RO decision disallowing the claim. However, that document indicates that the statements on it were transcribed "for subsequent presentation to . . . the Board", and, hence, that document might not have been filed with the RO, as an NOD must generally be under section 7105(b)(1). *See also* 38 C.F.R. § 20.300 (1993). In any event, it is not necessary for the Court to determine whether that document could be a valid NOD because the January 30, 1991, VA Form 1-9 filed by the appellant with the RO (and date-stamped as received by the RO on February 5, 1991) satisfies the requirements for a valid NOD with respect to the December 19, 1990, RO decision disallowing her claim and is sufficient to give this Court jurisdiction over the claim. *See Malgapo v. Derwinski*, 1 Vet.App. 397, 398-99 (1991) (holding that VA Form 1-9 can be valid NOD); *Hamilton*, 4 Vet.App. at 538 (implicitly reaffirming *Malgapo* on this point as long as a prior NOD had not been filed as to the particular claim). The Court holds, therefore, that the appellant filed a valid NOD as to her accrued-benefits claim after November 18, 1988, and the Court, therefore, has jurisdiction over that claim under VJRA § 402.

B. Merits of the Kidney-Disorder Claim

We must now determine whether, as the Board required, there must be new and material evidence in order for the appellant to pursue an accrued-benefits claim based on her

deceased husband's claim which was pending at his death. We agree with the Board.

1. Nature of Accrued-Benefits Claim.

We start with the law on accrued benefits. Section 5121(a) of title 38, U.S. Code, provides, in pertinent part:

> [P]eriodic monetary benefits...under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death...and due and unpaid for a period not to exceed one year, shall, upon the death of such individual be paid as follows:
>
> . . .
>
> (2) Upon the death of a veteran, to the living person first listed below:
>
> (A) The veteran's spouse;
>
> (B) The veteran's children (in equal shares);
>
> (C) The veteran's dependent parents (in equal shares) . . . .

38 U.S.C. § 5121(a)(2). As the ensuing analysis demonstrates, under this law, and the Secretary's regulations implementing it, 38 C.F.R. § 3.1000 (1993), the substance of the survivor's claim is purely derivative from any benefit to which the veteran might have been "entitled" at his death. Basically, the survivor cannot receive any such attributed benefit that the veteran could not have received upon proper application therefor. What the law has given to the survivor is, basically, the right to stand in the shoes of the veteran and pursue his claim after his death.

The only differences are that the law limits the survivor to one year's worth of those periodic monetary benefits to which the veteran was entitled at death and which were unpaid at the time of death and certain adjudication rules, discussed in part II.B.2, below, applicable to an accrued-benefits claim.

Under the appellant's theory, she could, as an accrued-benefits claimant, obtain accrued benefits even if there were absolutely no new evidence on the question of service

connection since the 1985 final BVA decision denying the veteran's claim for service connection. Such a result would conflict with the thesis of the statute that the survivor's claim derives from the deceased veteran's claim.

The legislative history of section 5121 demonstrates that the accrued one-year benefit to be paid is actually the very one that, upon proper application therefor, would have been owed to the veteran at death; only the payee has been changed, and the amount is limited to one year's worth. Before the technical recodification of VA laws in title 38, U.S. Code, in 1958, Pub. L. 85-857, 72 Stat. 1105, 1228 (1958), the predecessor provision for section 3021 (the forerunner of the current section 5121(a)) provided expressly that "compensation" (and other listed benefits) due and unpaid at a veteran's death was to be paid to the designated survivors as "accrued benefits". Pub. L. No. 85-56, § 921(a), 71 Stat. 83, 121 (1957). The legislative history specified that the 1958 title 38 codification was "basically a restatement of existing law", effective January 1, 1959. 1958 U.S.C.C.A.N 4353, H.R. Rep. No. 85-1298, 85th Cong., 2d Sess. 2 (1958); 1958 U.S.C.C.A.N 4375, S. Rep. No. 85-2259, 85th Cong., 2d Sess. 1 (1958).

2. Appellant's Fair-Process Arguments.

We have considered the impressive arguments mounted by the appellant's counsel in his reply brief. His basic argument is essentially the following: Even though the accrued-benefits claim is a derivative one, the survivor is nonetheless presenting that claim in his or her own right and was not a party to the prior claim by the veteran. Under the nonadversarial, informal nature of the VA claims-adjudication system, it should not be lightly assumed that a person not a party to a claim is bound by an adjudication of that claim. *See Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 333 (1985) (VA claims "process . . . is not designed to operate adversarially"); *Manio v. Derwinski*, 1 Vet.App. 140, 144 (1991); *Littke v. Derwinski*, 1 Vet.App. 90, 91 (1990). In *Thurber v. Brown*, 5 Vet.App. 119, 123 (1993), the Court stated: "The entire thrust of the

VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process." *Thurber* then laid out a sequence of VA adjudication procedures designed to afford such notice and hearing rights to VA claimants.

In this case, the appellant was entitled to none of these protections during her husband's lifetime in connection with *his* unsuccessful claim for service connection of his kidney disorder. She clearly was not afforded by VA either notice or the opportunity to be heard in connection with the process initiated in May 1984 by her husband and culminating in the Board's April 1985 adverse decision. Nor should she have been, since the applicable law and regulations do not require that such notice and opportunity be afforded to other than the benefits claimant and his or her representative. *See, e.g.*, 38 U.S.C. §§ 5104(a), 7105(b)(1), 7104(e), 7266; 38 C.F.R. §§ 3.103(a), (b), (f), 19.8, 19.25 (1993); *see also Hamilton*, 4 Vet.App. at 531, 534; *Rowell*, 4 Vet.App. at 14-15; *Ashley v. Derwinski*, 2 Vet.App. 307, 308 (1992); *Ashley v. Derwinski*, 2 Vet.App. 62, 64 (1992).

Finally, the appellant contends that the law is silent about imposing any evidentiary requirement on an accrued-benefits claimant other than the "evidence in [or deemed to be in] the file at date of death" requirement, *see Hayes (Mildred) v. Derwinski*, 4 Vet.App. 353, 360-61 (1993), and that to infer one under the circumstances would work a real and unintended hardship on such a claimant. This argument is not without facial appeal since section 5121 provides the following alternative description of an accrued benefit: "monetary benefits . . . based on evidence in the file at date of death". Read in isolation, these words could be interpreted to mean "based on ***all*** evidence in the file (including old evidence)". Or, they could be read as meaning "based on ***otherwise-permissible*** evidence in the file". We believe that the latter reading is one that accords meaning to all parts of the statute and construes "each part or section . . . in connection with

every other part or section so as to produce a harmonious whole." 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.05 (5TH ed. 1992) (quoted in *Sweitzer v. Brown*, 5 Vet.App. 503, 505 (1993); *Mays v. Brown*, 5 Vet.App. 302, 306 (1993); *Suttmann v. Brown*, 5 Vet.App. 127, 135 (1993); *In re Fee Agreement of Smith*, 4 Vet.App. 487, 493 (1993); *Lorenzano v. Brown*, 4 Vet.app. 446, 449 (1993; *Leopoldo v. Brown*, 4 Vet.App. 216 (1993); *Talley v. Derwinski*, 2 Vet.App. 282, 286 (1992)). In view of the basically derivative nature of the accrued-benefits claimant's rights and the importance of the finality/reopening provisions of 38 U.S.C. §§ 7104(b), 7105(c), and 5108 in the VA claims adjudication process, *see generally Russell v. Principi*, 3 Vet.App. 310, 312 (1992) (en banc), we hold that section 5121(a) must be read in such a way as to harmonize with those provisions. Otherwise, we might agree with the appellant that it is fundamentally unfair for the Secretary to be seeking to bind this appellant to the results of the initial administrative Board determination to which she was not a party, of which she received no notice, in which she had no statutory or regulatory right to intervene in order to protect any interests she might have had in its outcome, and as to which no judicial review was available at the time. *See Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 329 (1971); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983); *Nasem v. Brown*, 595 F.2d 801, 806 (D.C. Cir. 1979); *cf. Gardner v. Brown*, 5 F.3d 1456, 1463-64 (Fed. Cir. 1993) ("vigorous review" of pre-judicial-review VA regulations, and not deference to agency interpretation, is appropriate), *cert. granted*, 114 S. Ct. 1396 (1994).

Accordingly, we hold that Congress intended and provided for exactly that result and that there is no unfairness to accrued beneficiaries when the basically derivative nature of their rights is fully understood in the context discussed in part II.B.1., above. The appellant has been given her **own** dependency and indemnity compensation and other (such as burial) death

benefits, and her arguments about collateral estoppel and issue preclusion would have greater resonance as to those benefits.

Indeed, as to such benefits, VA regulations provide as follows:

> Except with respect to benefits under the provisions of 38 U.S.C. [§] 1318 [non-service-connected benefits for survivors of veterans rated totally disabled by service-connected disabilities at time of death] and certain cases involving individuals whose [VA] benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. [§§] 6104 and 6105, ***issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.***

38 C.F.R. § 20.1106 (1993) (found at § 19.196 until 1992) (emphasis added); *see also* 45 Fed. Reg. 56,093-094 (1980) (explanation of predecessor regulation § 19.196 as allowing "the Board to ***review 'de novo' service connection cause of death cases*** notwithstanding the fact that a final appellate decision had been rendered during the veteran's lifetime" (emphasis added)). The Secretary contends that the term "death benefits" in the regulation "appears to refer to death compensation, [DIC], or a death pension, which are continuing, periodic benefits awarded following a veteran's death based on the beneficiary's status as the veteran's survivor [, and not to] . . . accrued benefits [which are] monetary sums owing to the veteran, but unpaid at the time of death." Resp. at 7. The Secretary's interpretation is not unreasonable. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991) ("it is well established that an agency's interpretation of its own regulation is entitled to substantial deference"). Although the appellant contends that "death benefits" in this regulation should be construed as also referring to an accrued-benefits claim, such an interpretation would be fundamentally at odds with the derivative-benefits analysis set forth in part II.B.1., above. Indeed, such an

analysis implicates federal case law under which a successor whose interests are derivative from the rights of another party is bound by the determination of the first party's rights. *See, e.g., Terrell v. DeConna*, 877 F.2d 1267, 1270-72 (5th Cir. 1989); *Roy v. Jasper*, 666 F.2d 714, 717-18 (1st Cir. 1981); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 48(2) (1982).

Nor can the drafting (which the Secretary terms "imprecise", Resp. at 8) of another VA regulation (38 C.F.R. § 3.152 (1993)) entitled "Claims for death benefits", which discusses "accrued benefits" as being part of a claim for "death benefits", even if it carried the implication asserted by the appellant (as to which the Court is dubious) that accrued benefits are themselves death benefits, change the plain meaning of the statute. Moreover, another VA regulation provides in a way fully consistent with that plain meaning:

> When an appeal is pending before the Board of Veterans' Appeals at the time of the appellant's death, the Board may complete its action on the issues properly before it without an application from the survivors.

38 C.F.R. § 20.1302 (1993).

3. Reopened Claim.

For all of the above reasons, the Court now holds that a survivor's accrued-benefits claim asserting that the veteran's disorder was service connected necessarily incorporates any prior adjudications of the service-connection issue in claims brought by the veteran, because the accrued-benefits claim derives from the veteran's service-connection claim. Accordingly, the Board must generally adjudicate the appellant's accrued-benefits claim pursuant to the statutory provisions governing a reopened claim. Analysis of those provisions yields the conclusion that there must be new and material evidence before the accrued-benefits claim may be considered, just as would have been the case if the veteran had himself been re-presenting the compensation claim.

The Board concluded that no "new and material" evidence had been submitted since the April 1985 BVA decision disallowing the veteran's claim for service connection for a kidney disorder, and it thus declined to adjudicate on the merits the appellant's claim for accrued benefits for the veteran's kidney disorder. The finality attributes of prior BVA decisions are established in 38 U.S.C. § 7104(b), which provides: "Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." *See generally Russell, supra.* The referenced exception in 38 U.S.C. § 5108 provides: "If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim."

In the instant case under 38 U.S.C. § 5121(a), the appellant is entitled to accrued benefits based upon the veteran's kidney condition only if it is determined that the veteran was entitled, based on the evidence in the file at the date of his death, to service connection for that condition. *Cf. Hayes, supra* (certain evidence submitted after veteran's death may be deemed to have been in the file at the date of death). The appellant's entitlement to accrued benefits is thus predicated upon her establishment of the exact facts which the veteran was required to establish, prior to his death, on his claim for service connection for the kidney condition. Therefore, just as the veteran was required to submit new and material evidence in order to obtain reopening and readjudication of his kidney claim during his lifetime, so there must be new and material evidence in order for the accrued-benefits claimant to obtain full adjudication of the accrued-benefits claim based upon "the same factual basis" as the veteran's denied service-connection claim. A similar result could obtain under 38 U.S.C. § 7105(c) and 38 C.F.R. §§ 3.104(a) and 3.105(a) (1993), even though the pertinent prior final denial occurred in an unappealed RO

decision rather than a BVA decision. *Cf. Suttmann*, 5 Vet.App. at 135-36. Hence, the appellant may receive a merits adjudication of her accrued-benefits claim based on the veteran's kidney disorder claim only if there is new and material evidence, as described below, since the time of the BVA's April 1985 denial of the veteran's service-connection claim based on that disorder.

4. New and Material Evidence.

Where new and material evidence is required before a claim may be fully adjudicated, the Board must conduct a "two-step" analysis. *Manio*, 1 Vet.App. at 145. First, it must determine whether the evidence presented or secured since the pertinent prior final disallowance is "new and material". If it is, the Board must then adjudicate the claim on the basis of all the evidence, both new and old. *See Jones (McArthur) v. Derwinski*, 1 Vet.App. 210, 215 (1991). The determination as to whether evidence is "new and material" is a question of law subject to de novo review by this Court under 38 U.S.C. § 7261(a)(1). *See Masors v. Derwinski*, 2 Vet.App. 181, 185 (1992); *Jones*, 1 Vet.App. at 213; *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991). The Court recently synthesized the applicable law as follows:

> "New" evidence is that which is not merely cumulative of other evidence of record. "Material" evidence is that which is relevant to and probative of the issue at hand and which, as this Court stated in *Colvin, supra*, . . . must be of sufficient weight or significance (assuming its credibility) that there is a reasonable possibility that the new evidence, when viewed in the context of all the evidence, both new and old, would change the outcome.

Cox v. Brown, 5 Vet.App. 95, 98 (1993).

In addition, when the reopening is sought as part of an accrued-benefits claim under 38 U.S.C. § 5121(a), the new and material evidence must have been in the veteran's file at time of death or be deemed to have been so under *Hayes, supra*.

In the instant case, the Court concludes that there was no such new and material evidence since the time of the BVA's prior final disallowance in April 1985 of the veteran's kidney-disorder claim, and that, therefore, the Board was correct in not proceeding to the section 5108 step-two full adjudication of the accrued-benefits claim derived from the veteran's claim. The evidence of record since the 1985 BVA denial consists of the following: (1) reports of the veteran's medical treatment by VA and private physicians in 1986 (R. at 114-18, 120) and the report of his final hospitalization and death in 1988 at a VA facility (R. at 180-81); (2) photocopies of SMRs previously considered by the BVA in 1985 (R. at 136-37, 142-43); (3) the sworn testimony of the veteran and his wife (R. at 126-33, 163-69); (4) lay statements from the veteran, his wife, and David Schwabauer (R. at 125, 141, 154, 201-11); and (5) a lay statement, dated December 1986, from the veteran's brother (R. at 212). The item (1) records are not "material" because they pertain only to treatment of the veteran many years after separation and do not relate his then-current condition to his service. The items (2), (3), and (4) materials are not "new" because they are merely cumulative of records and statements previously considered by the BVA in 1985. The item (5) brother's statement that the veteran had experienced difficulty passing an insurance physical in the 1950s (R. at 212) may not be considered as part of the appellant's accrued-benefits claim to reopen the veteran's denied service connection claims because, as far as can be determined from the record on appeal, that statement was not evidence in the veteran's file at the date of his death (or evidence that fits within *Hayes*, *supra*). In any event, that statement, while not completely cumulative of the veteran's September 1984 statement that he had been denied life insurance in the ***1960s*** because of his kidney disorder, is not "material" because it does not indicate that the kidney disorder or symptomatology was present in service or within an applicable presumption period or is otherwise service related.

Therefore, because there was no new and material evidence so as to require full adjudication of the accrued-benefits kidney-disorder claim under 38 U.S.C. §§ 5108 and 7104(b), the Court will affirm the Board's denial of that claim.

C. Hypertension Claim

In denying the claim for accrued benefits based on the veteran's hypertension, the Board concluded that the veteran's blood-pressure readings had been normal during service and upon private medical examination in 1965; that the earliest findings possibly indicating hypertension had been elevated diastolic blood-pressure readings on VA examinations in 1972 and 1973; and that hypertension had first been diagnosed by a VA physician in 1984. *Zevalkink*, BVA 91-19719, at 9-10. The Board thus concluded that there was no evidence that the veteran had had hypertension during service or within an applicable presumption period.

The Court reviews BVA fact findings under a "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Pursuant to that standard, "[I]f there is a 'plausible' basis in the record for the factual determinations of the BVA, . . . we cannot overturn them." *Gilbert, supra*. In the instant case, the Board's findings that there is no evidence linking the veteran's hypertension to service is supported by a plausible basis in the record and is thus not clearly erroneous. The Court will, therefore, affirm the BVA decision denying the accrued-benefits claim as to hypertension.

D. Myalgia and Arthritis Claims

Although the Board's decision listed the myalgia and arthritis claims as separate claims, the Board discussed those issues in combination and treated those claims as essentially intertwined. *Zevalkink*, BVA 91-19719, at 10-11. ("Myalgia" is "muscle pain"; arthritis is "articular rheumatism" or "inflammation of a joint"; "rheumatoid arthritis" is "a thickening of articular soft tissue"; "rheumatism" is an "[i]ndefinite term applied to various conditions with pain or

other symptoms which are of articular origin or related to other elements of the musculoskeletal system". STEDMAN'S MEDICAL DICTIONARY 134-35, 1009, 1358 (25th ed. 1990).) The record on appeal indicates that VA has treated those claims as intertwined throughout the course of its adjudications. *See* R. at 134, 187. Accordingly, the Court will treat these claims as intertwined for purposes of review in the instant appeal. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991). In light of the apparent SMR from April 1944 stating "myalgia, marked, . . . both thighs and legs" (R. at 136, 209; *see also* R. at 134), the Board apparently erred in stating that the SMRs "are negative for" "rheumatoid arthritis and myalgia", *Zevalkink*, BVA 91-19719, at 10. Because the record contains no evidence of recurrence of such a condition, either at separation (*see* R. at 22) or at any time thereafter, *see Rabideau v. Derwinski*, 2 Vet.App. 141, 143 (1992) (in order for service connection to be awarded there must be evidence of "a present disability which is attributable to" service); 38 C.F.R. § 3.303(b) (1993) (chronicity requires either diagnosis of chronic condition in service or continuity of symptomatology thereafter); *Sanchez v. Derwinski*, 2 Vet.App. 330, 333 (1992), however, any such error by the Board was not prejudicial to the appellant. *See* 38 U.S.C.A. § 7261(b); *Tirpak v. Derwinski*, 2 Vet.App. 609, 611 (1992); *Godwin v. Derwinski*, 1 Vet.App. 419, 425 (1991).

III. Conclusion

Upon consideration of the record and the pleadings of the parties, the Court denies the Secretary's motion for summary affirmance. The Court affirms the June 10, 1991, BVA decision.

AFFIRMED.

APPENDIX C

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

DOCKET NO. 89-41 108) DATE JAN 11 1993
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THE ISSUE

Whether new and material evidence has been submitted to reopen a claim of entitlement to service connection for chronic obstructive pulmonary disease, for accrued benefits purposes.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

M. Siegel, Counsel

INTRODUCTION

The case that is the subject of this decision first came before the Board of Veterans' Appeals (hereinafter the Board) on appeal from rating actions of November 1988 and August 1989 from the Phoenix, Arizona, regional office (hereinafter RO). The notice of disagreement was received on July 10, 1989, and the statement of the case was issued on August 14, 1989. A hearing was held at the RO on August 16, 1989; a substantive appeal dated August 16, 1989, was also received. The hearing officer rendered a decision on August 25, 1989. The case was thereafter forwarded to the Board, and the veteran's representative, the Disabled American Veterans, presented written argument on his behalf on January 26, 1990.

In a decision dated in April 1990, the Board denied service connection for chronic obstructive pulmonary disease. The Veteran appealed to the United States Court of Veterans Appeals (hereinafter the Court); he died on November 1990, and his widow, the appellant, has continued to pursue this case on an accrued benefits basis. By means of a subsequent decision, Hesse v. Derwinski, 2 Vet.App. 359 (1992), the Court vacated the April 1990 Board decision and remanded the case to the Board for further adjudication. This decision is rendered by the Board in response to the Court's action.

The Veteran served on active duty from September 1942 to September 1945. As noted above, he died in November 1990, and this case is being pursued by his widow, the appellant, for accrued benefits purposes.

CONTENTIONS OF APPELLANT ON APPEAL

The appellant contends, in essence, that the RO erred when it refused to grant her husband, the veteran, service connection for chronic obstructive pulmonary disease. It is specifically alleged that the Department of Veterans Affairs (hereinafter VA) had in fact granted service connection for a lung disorder, in September 1945. In support of this allegation, it is pointed

out that a photocopy of the VA document purporting to grant the veteran monthly compensation of 10 percent for a "lung condition" is of record.

DECISION OF THE BOARD

In accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), following review and consideration of all relevant evidence and material in the veteran's claims folder, and for the following reasons and bases, it is the decision of the Board that a claim for service connection for chronic obstructive pulmonary disease, presented for accrued benefits purposes, has not been reopened.

FINDINGS OF FACT

1. All evidence necessary for an equitable disposition of the appellant's case has been developed.

2. Prior to the current case, service connection for chronic obstructive pulmonary disease has been denied most recently by the Board in a decision dated in August 1987.

3. The evidence submitted since August 1987 consists primarily of sick reports dated between February 1944 and January 1945; a summary of information contained in hospital admission card data files compiled by the Office of the Surgeon General, Department of the Army; and testimony presented by the veteran at a personal hearing at the RO in August 1989. In addition, the facts relating to an October 1992 attempt by VA to obtain the original of the document that allegedly granted the veteran service connection for a lung condition are also pertinent, in view of the instructions of the Court in its April 1992 decision.

4. The evidence cited above does not present any information or data that had not previously been considered by the Board, nor does it provide information that would demonstrate that previously-submitted evidence, and in particular the document by which VA allegedly granted service connection for a lung

condition, should be considered in a context other than that which it had already been viewed. Accordingly, it is found that this evidence is not new, and does not serve to reopen the claim for service connection for chronic obstructive pulmonary disease.

CONCLUSION OF LAW

The evidence received since August 1987, when service connection for chronic obstructive pulmonary disease was most recently denied by the Board, is not new. The appellant's claim for service connection for chronic obstructive pulmonary disease, presented for accrued benefits purposes, has not been reopened. 38 U.S.C.A. §§ 5108, 5121, 7104(b) (West 1991); 38 C.F.R. § 3.156(a) (1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Initially, we find that the appellant's contentions are "well grounded" within the meaning of 38 U.S.C.A. § 5107(a) (West 1991); that is, she has presented contentions that are plausible. She has not asserted that any records of probative value that may be obtained and which have not already associated with the veteran's claims folder, or which have not been sought by VA, are available. We accordingly find that all relevant facts have been properly developed, and that the duty to assist, mandated by 38 U.S.C.A. § 5107(a) (West 1991), has been satisfied.

The veteran's request for service connection for chronic obstructive pulmonary disease has been considered by the Board on numerous previous occasions. In a decision of November 1977, the Board noted that the veteran's service medical records were not available, and apparently had been destroyed in the July 1973 fire at the National Personnel Records Center (hereinafter NPRC). A daily sick report was of record, and showed that the veteran had been hospitalized while in service, from July 18, 1944, to August 3, 1944, for unspecified reasons. The Board also noted that he had

indicated that he had been treated in 1944, while in service, for a lung infection, and that a fellow former serviceman had reported in March 1976 that the veteran had been hospitalized in 1944 for treatment of such a disorder. In addition, the Board considered post service medical records showing treatment for various pulmonary and respiratory problems beginning in 1946, and a statement from a private physician that a history taken in 1953 indicated that the veteran had had recurrent difficulty with respiratory disease extending back to when he had been in service.

Based on this evidence, the Board decided, in its November 1977 decision, that any inservice lung disorder had been acute and transitory, and unrelated to the veteran's post service pulmonary problems. Service connection for chronic obstructive pulmonary disease was accordingly denied.

The veteran thereafter again requested service connection for chronic obstructive pulmonary disease, and it was again denied by the Board, this time in a decision dated in February 1980. At that time, the Board again reviewed the evidence that had been considered in November 1977, along with additional medical evidence consisting primarily of statements from private physicians to the effect that the veteran's current pulmonary problems began during his active service. Statements from his wife and from fellow former servicemen, pertaining to complaints made by the veteran both during service and thereafter, were also considered. The Board found that the medical evidence did not demonstrate continuity of symptomatology between any inservice lung problems and his post service pulmonary disorders, and that the several lay statements did not establish that the veteran's complaints were more than acute and transitory.

The Board again denied service connection for chronic obstructive pulmonary disease in a decision of May 1981. It

noted that additional medical statements from private physicians had been submitted, but found that these statements were essentially cumulative in nature and did not serve to reopen the veteran's claim.

In March 1982, an expanded panel of the Board undertook formal reconsideration of the veteran's claim for service connection for chronic obstructive pulmonary disease. This expanded panel reviewed all of the evidence of record, and found that, while the veteran appeared to have been hospitalized during service for a respiratory disorder, the evidence did not show that this marked the onset of chronic obstructive pulmonary disease. It also found that post service medical treatment was not sufficiently documented so as to form a proper evidentiary basis for a grant of service connection. The expanded panel found that service connection for chronic obstructive pulmonary disease was not warranted.

In a decision dated in October 1984, the Board once again denied service connection for chronic obstructive pulmonary disease. The evidence that had already been of record, and which provided the basis of the prior Board decisions, was reviewed, along with a document that had not previously been associated with the veteran's claims folder. This document was a photocopy of what appeared to be the left-side portion of a VA Form P-80a that notified the veteran of an award of 10 percent monthly compensation for a lung condition, beginning on September 10, 1945. The Board noted that a VA report of contact (dated in December 1983) indicated that staffers in a congressional office with which the veteran had been in contact had certified that this document was original and that there was absolutely no evidence that it had been altered. In denying service connection, the Board found that this VA form "most likely" referred to an inservice episode of pneumonia, and noted that a service hospitalization record dated August 4, 1944, showed that the veteran had been hospitalized with

primary pneumonia of the lower lobe. The Board found that this evidence did not establish that any inservice respiratory disorder was related to his post service chronic obstructive pulmonary disease. This decision does not show that the Board at that time considered whether the VA form was authentic or had not been altered in some manner, or that such questions had indeed been raised; the "certification" by the congressional staffers was not apparently reviewed.

The veteran's claim for service connection for chronic obstructive pulmonary disease was again the subject of a reconsideration decision by an expanded Board panel in August 1985. Once again, all of the evidence of record, to include the photocopy of the portion of VA Form P-80a, was reviewed, and once again service connection was denied. The expanded Board panel pointed out that there was no objective evidence that a chronic respiratory disorder had been manifested during service or shortly thereafter, and that under sound medical principles there was no etiological relationship between the primary pneumonia of the lower lobe noted in service in August 1944 and the later-diagnosed chronic obstructive pulmonary disease.

In August 1987 the Board again denied the veteran service connection for chronic obstructive pulmonary disease - for the seventh time in less than ten years. In the decision rendered in August 1987, the Board discussed the evidence submitted by the veteran subsequent to October 1984, which consisted primarily of photocopies of VA statutory and regulatory provisions and various correspondence, along with a statement from a private physician reporting that the veteran had underlying chronic lung disease. The Board found that this evidence was either cumulative or repetitious of previously-considered evidence or legal criteria, or related to his medical status many years after his separation from service. The Board

held that there was no factual basis for a grant of service connection for chronic obstructive pulmonary disease.

Prior to his death, the veteran again requested service connection for chronic obstructive pulmonary disease, and again the Board denied his claim, in a decision of April 1990. He appealed to the Court, and died before action by the Court could be taken. His wife, the appellant, has pursued his claim for accrued benefits purposes. As indicated above, the Court, in Hesse v. Derwinski, supra, vacated the April 1990 Board decision and remanded the case to the Board for further adjudication. The Court specifically requested that we discuss the implications of the VA Form P-80a that purportedly shows that the veteran had been granted service connection by VA as of September 1945 for a lung condition. The Court also requested that we discuss the information contained in the hospital admission card summary, and in particular the phrase "80% residue" noted on that document.

Claims that have been the subject of prior Board decisions may be reopened, and the entire evidentiary record thereafter considered, only upon the submittal of additional evidence which, under the applicable statutory and regulatory provisions, is both new and material. "New" evidence means more than evidence that has not previously been included in the claims folder, and must be more than merely cumulative, in that it presents new information. Colvin v. Derwinski, 1 Vet.App. 171 (1991). In addition, the evidence, even if new, must be material, in that it is relevant and probative.

The evidence submitted by the veteran in support of his request to reopen his claim for service connection for chronic obstructive pulmonary disease, and which was the subject of our decision in April 1990, consists primarily of sick reports dated between February 1944 and January 1945, a summary of hospital admission card data files compiled by the Office of the

Surgeon General, and testimony presented by the veteran at an August 1989 personal hearing at the RO.

This evidence is not new. While the actual documents may not have been previously considered, the information contained in those documents, and presented at the hearing, had in some form already been of record. This evidence, therefore, must be considered cumulative in nature, and repetitious.

The sick reports show that the veteran had been treated in February 1944, April 1944, September 1944, December 1944 and January 1945, for an unidentified illness or illnesses. The fact that he had been treated in service for an illness or illnesses had been of record prior to his request to reopen his claim, and had been considered by the Board when it had denied his previous requests for service connection for chronic obstructive pulmonary disease; in fact, the Board specifically noted in several decisions that he had been treated for pneumonia while in service.

The hospital admission card summary similarly does not provide new evidence. It indicates that the veteran had been hospitalized in July 1944 for "Pneumonia, primary, atypical, etiology unknown." As discussed above, the fact that he had pneumonia in service had been previously of record, and had been considered by the Board on several occasions. This document does not provide any other information with regard to his pneumonia other than that he was returned to duty - again, information that had already been known.

As noted by the Court, this document also contains one other piece of information, which is a reference to "sample size" and the "explanation" of "80% residue." The veteran had argued that "medically this simply states that the hospital records acknowledged that the cure or medication was only 20%

effective and the 80% was the residue and or residual remaining upon discharge from hospital."

While we recognize that the phrase "80% residue" may be ambiguous, we find that the veteran, in his attempt to convince us that his claim should be reopened and that he should be granted service connection for chronic obstructive pulmonary disease, imparted a meaning and a context to this entry that, quite simply, is not there. The document in question is not a medical record, but is rather a summary of information compiled for statistical purposes from various records by the Office of the Surgeon General for statistical purposes. In order to clarify the meaning of the entries on this document, VA contacted officials at the NPRC; the VA Report of Contact, dated on December 16, 1992, indicates, in relevant part, as follows:

> Contacted [NPRC Congressional Liaison] with regard to the information we want to clarify on the Hospital Admission card of the veteran..., from the Office of the Surgeon General, Department of the Army. [He] put me in touch with [a Management Analyst for the Office of the Director, NPRC] who is a specialist in this area. She informed me that the information on the admissions card denotes the sample size of a survey taken of all hospital admissions. This means that they did a survey of 80% of all the patients admitted and that [the veteran] was among them. The "Code: 8" means that the sample size was 80% of the total admissions surveyed. The "Explanation: 80% residue" is an explanation of the code. The term residue is misleading but it only refers to the size of

> the survey. It has no bearing on the condition of [the veteran] when he was admitted. [She] said that the sample taken was for all admissions regardless of their medical condition." (Emphasis added.)

In brief, the category "sample size" refers to statistical methodology, and not to some type of pulmonary diagnostic procedure.

Moreover, we must find that the testimony given by the veteran at the August 1989 personal hearing does not present any information that had not previously been considered in conjunction with prior decisions, with regard to his claims of inservice and post service medical problems. Rather, we find that this testimony is a repetition of facts that had already been reviewed and discussed on the many prior occasions that his claim for service connection had been before the Board; that is, that he had pulmonary problems that began during service, and for which he received treatment that began soon after his discharge from service and which has continued to the time of the hearing. This evidence is not new.

Finally, we note that the Court, in its decision, specifically requested that we discuss the implications of the VA Form P-80a that allegedly shows that the veteran had been granted service connection by VA as of September 1945 for a lung condition. This particular document had been considered by the Board in conjunction with its decisions of August 1984, August 1985 (which was a decision rendered by an expanded panel for reconsideration purposes) and August 1987; therefore, it cannot be considered evidence submitted by the veteran in support of his request to reopen his claim.

Nonetheless, we must point out that the authenticity of this record, and the information contained therein, have never been

ascertained by VA. Although a December 1983 VA report of contact is to the effect that several congressional staffers indicated that they had seen this document, and "certified" (apparently over the telephone) that "the document was original and there was absolutely no evidence that the document had been altered," we are not as convinced, particularly in the absence of an examination of that document by VA. We believe that such an examination is critical, in that there is no other evidence that has been associated with the veteran's claims folder that indicates that VA at any time granted service connection for a "lung condition," or assigned a 10 percent rating therefor. There is no record of a rating action, payments of money by VA, or correspondence or checks returned to VA as undelivered. There is also no record of an application by the veteran in 1945, or for many years thereafter, for VA benefits, and we take particular note of the veteran's sworn testimony in 1977 and 1981 that he had not filed a claim for VA benefits prior to 1977.

For these reasons, we believe that VA examination of the actual document by which VA purportedly granted service connection for a lung condition, a document that was apparently not "discovered" until 1983, is important. A review of the record does not show that any VA personnel have been provided with an opportunity to examine this document in such a manner as to resolve to our satisfaction the matter of whether it has or has not been altered, which cannot be ascertained by consideration of the photographed copy only. In this regard, we find it significant that a recent attempt by VA to secure the original of this document was rebuffed by the appellant. At the Board's request, following the return of this case to the Board by the Court, a VA field investigator contacted the appellant, the veteran's widow, in order to obtain this document; a VA report of contact dated October 15 1992, includes the notation: "[Appellant] refused to release the original...."

We believe that the refusal of the appellant to provide the original of this document, thereby preventing VA from determining whether it had been altered, pertains directly to our refusal to find that it conclusively proves that the evidence contained therein is indeed a true representation of the events alleged; that is, that VA granted service connection for a lung disorder, affective as of September 10, 1945, and rated this disorder as 10 percent disabling. In this regard we rely on the best evidence rule, which "prohibits the introduction into evidence of secondary evidence unless it is shown that original document has been lost or destroyed or is beyond jurisdiction of court without fault of the offering party; if original document is lost, then secondary evidence is admissible." Black's Law Dictionary 146 (Fifth ed. 1979).

The legal theory inherent in this rule is also found in the original document rule, which holds that "[t]he best evidence of the contents of a document is the original of that document. The party bearing the burden of proving the contents of a document is required to introduce the original unless he is excused from its production because its nonavailability...." Id. at 991.

We must reiterate that the original of the document at issue has not been furnished by the appellant for VA examination. Until that document is provided, and we have ascertained that it has not been altered, we are unwilling to accept as conclusive the information contained in that document.

In brief, we find that the evidence that was submitted by the veteran in support of his request to reopen his claim for service connection for chronic obstructive pulmonary disease is neither relevant nor probative in establishing that the incurrence of this disorder is in some manner related to his military service. We conclude, therefore, that new and material evidence has not been submitted to reopen his claim for service connection for

that disorder, which has been pursued by the appellant for accrued benefits purposes. 38 U.S.C.A. §§ 5108, 5121, 7104(b) (West 1991); 38 C.F.R. § 3,156(a) (1991).

ORDER

New and material evidence has not been submitted to reopen a claim for service connection for chronic obstructive pulmonary disease, for accrued benefits purposes. The benefits sought on appeal remain denied.

*

C. P. RUSSELL

JACK W. BLASINGAME

*38 U.S.C.A. § 7102(a)(2)(A) (West 1991) permits a Board of Veterans' Appeals section, upon direction of the Chairman of the Board, to proceed with the transaction of business without awaiting assignment of an additional Member to the Section when the Section is composed of fewer than three Members due to absence of a Member, vacancy on the Board or inability of the Member assigned to the Section to serve on the panel. The Chairman has directed that the Section proceed with this decision without awaiting the assignment of a third Member.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the description, provided that a notice of disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988 [see § 402 of the Veterans' Judicial Review Act (Pub. L. 100-687)]. The date which appears on the face of

the decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 90-763

ELEANOR M. HESSE, APPELLANT,

v. VA FILE NO. 14 373 036

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, MANKIN, and IVERS, *Judges*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 28(j), this action may not be cited as precedent.

On October 26, 1994, the Court ordered this appeal dismissed pursuant to a joint motion and ordered both judgment and mandate entered on the date of the order. On November 16, 1994, the appicant filed an unopposed motion for recall of the mandate in this matter.

On consideration of the foregoing, it is

ORDERED that the October 26, 1994, mandate is recalled.

DATED: NOV 29 1994 **PER CURIAM.**

Copies to:

Kenneth W. Starr, Esq.
Christopher A. Cole, Esq.
Kirkland & Ellis
655 Fifteenth Street, NW, Suite 1200
Washington, DC 20005

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

llg

APPENDIX E

UNITED STATES COURT OF VETERANS APPEALS

NO. 90-763

ELEANOR M. HESSE, APPELLANT,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, MANKIN, and IVERS, *Judges*.

ORDER

On October 13, 1994, the parties filed a joint motion requesting that the stay in this case be lifted and asking that judgment be entered against the appellant as the appellant concedes would be required under the decisions of the Court in *Zevalkink v. Brown*, 6 Vet.App.483 (1994), and *Landicho v. Brown*, __ Vet.App.__, No.90-1150 (Sept.23, 1994) (consolidated with *Oseo v. Brown*, No. 92-90).

On consideration of the foregoing, it is

ORDERED that judgment will be entered on the date of this order. Pursuant to Rule 41(b) of the Court's Rules of Practice and Procedure, this order constitutes the mandate of this Court.

DATED: OCT 26 1994 **PER CURIAM.**

Copies to:

Kenneth W. Starr, Esq.
Christopher A. Cole, Esq.
Kirkland & Ellis
655 Fifteenth Street, NW, Suite 1200
Washington, DC 20005

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420 llg

APPENDIX F

UNITED STATES COURT OF VETERANS APPEALS

No. 90-763

ELEANOR M. HESSE, Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs, Appellee

JUDGMENT

The decision of the Court having been issued in this case, and the time for reconsideration or review thereof pursuant to Rule 35 of the Court's Rules of Practice and Procedure having expired,

Judgment in accordance with the Court's decision is hereby entered pursuant to Rule 36 this date.

DATED: OCT 26 1994

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

Copies to:

By: _____

Kenneth W. Starr, Esq.
Christopher A. Cole, Esq.
KIRKLAND & ELLIS
655 Fifteenth Street, NW, Ste. 1200
Washington, DC 20005

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX G

UNITED STATES COURT OF VETERANS APPEALS
No. 90-763.

ELEANOR M. HESSE, APPELLANT,
v.
EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

United States Court of Veterans Appeals.

(Decided Apr - 22 1992)

Eleanor M. Hesse, pro se.

James A. Endicott, Jr., Gen. Counsel, *Barry M. Tapp*, Asst. Gen. Counsel, *Andrew J. Mullen*, Deputy Asst. Gen. Counsel, and *Carolyn F. Washington*, Washington, D.C., were on the pleadings for appellee.

Before KRAMER, MANKIN, and IVERS, *Associate Judges*.

MANKIN, *Associate Judge*: Before his death, Burt L. Hesse initiated this appeal of an April 17, 1990, Board of Veterans' Appeals (BVA or Board) decision that denied him service connection for his chronic obstructive pulmonary disease (COPD). *Burt L. Hesse*, BVA 90-13896 (Apr. 17, 1990). The veteran died while his appeal was pending in this Court, and his widow, Eleanor M. Hesse, was substituted as appellant. Upon review, we find that the BVA, in denying the veteran's claim, failed to comply with the requirement of 38 U.S.C. § 7104(d) (formerly § 4004(d)) that its decision provide an adequate statement of reasons or bases for its findings and conclusions. We therefore vacate the Board decision, retain jurisdiction, and remand the case to the Board for further adjudication. *See Gilbert v. Derwinski*, 1 Vet.App. 49 (1990).

I. BACKGROUND

Burt L. Hesse served in the Army Air Corps from September 1942 to September 1945. Most of his service medical records were destroyed in the 1973 fire at the National Personnel Records Center in St. Louis; however, it is known that while in service, his name appeared on various daily sick call reports, and that in 1944, he was hospitalized for pneumonia. From 1956 to 1965, the veteran's private physician (apparently, Dr. du Roy) recorded medical notes indicating that Hesse suffered from various ailments, including upper respiratory infection. R. at 36-38. Reports of X-rays taken in 1975 noted "poor inspiratory effort," "poorly defined" cardiac diameter, "parenchymal fibrosis" (fibrous degeneration of tissue), and other indications of cardiopulmonary disease. R. at 44-46.

In February 1976, Hesse filed a claim for compensation or pension. In support of his claim, he submitted the statement of Dr. Eframo, another private physician, who said that he had been treating Hesse since January 1971 for hypertension and for a cardiac and pulmonary disorder. R. at 43.

The report of an April 1976 X-ray examination noted "passive congestive changes of the lower lung fields." R. at 49. In July 1976, Dr. Eframo, in a handwritten medical report, stated that Hesse's respiratory problem was first noted while he was in service, and was related to exposure to mustard gas. R. at 54. In December 1976, Hesse reported for a Veterans' Administration (now the Department of Veterans Affairs) (VA) examination. The VA physician recorded several diagnoses, including "severe obstructive lung disease," R. at 65-66, also noted elsewhere as COPD. R. at 73.

In a February 1977 rating decision, the VA denied service connection for the veteran's COPD, but awarded him a non-service-connected disability pension. Subsequently, the veteran submitted new evidence, including a statement from Dr. Prouet, also a private physician, who asserted that he had treated Hesse in 1946 for "numerous severe recurrent

respiratory infections," including pneumonia. R. at 78. Nevertheless, in November 1977, the BVA found that the veteran's COPD "was not incurred in or aggravated by service." R. at 83. In its decision, the Board relied in part on various notations in the veteran's post-service medical records indicating that his lungs were "clear," which in the Board's view demonstrated that Hesse's COPD was unrelated to his treatment for a lung disorder while in service. R. at 82.

Dissatisfied with the denial of his claim for compensation, Hesse submitted yet further medical evidence, including letters from Dr. Eframo and Dr. du Roy. Both doctors asserted that, even if their notes may have indicated that they found the veteran's lungs to be "clear" on particular occasions, such findings should not be interpreted to preclude the presence of disease. R. at 84-87. Dr. du Roy stated that he could "hardly remember a time" when the veteran was not wheezing, short of breath, or suffering from some manifestation of pulmonary disease. R. at 86. Two VA rating boards characterized this and additional evidence as "cumulative and repetitious" and again denied the claim in February 1978 and July 1979. R. at 89, 92. Hesse then submitted two "buddy letters" from veterans who attested to their recollection that Hesse had suffered from lung problems in service. The VA considered these letters insufficient, however, to warrant a favorable decision, and again denied the veteran's claim in September 1979. From 1980 to 1982, the case came before the BVA three more times, the last of these on reconsideration by an expanded section of the Board; each adjudication resulted in denial of Hesse's claim. In 1983, the case took a new turn when Hesse submitted what was purported to be a partial copy of a 1945 VA Form P-80a notifying him that he had been awarded a 10% disability rating for a lung condition. R. at 129-30. According to Hesse, the award notice turned up when his brother was going through their late father's personal effects. Hesse asserted that he had moved frequently following his separation from service, and

that he had never received a disability payment under the 1945 award letter.

Despite this evidence, in December 1983, a rating board again denied the veteran's reopened claim. Although the BVA did not dispute the authenticity of the Form P-80a, it denied the veteran's claim in May 1985 and, on reconsideration, again in August 1985. Hesse subsequently attempted to reopen his claim once again on the basis of new and material evidence, but apparently was able to muster no new evidence of significance. In August 1987, the BVA found the veteran's newly submitted evidence to be "cumulative and repetitious of prior considered evidence," R. at 160, and again denied his claim.

In 1988, Hesse requested the VA's assistance in obtaining additional service records in a renewed attempt to reopen his claim. The result was a one-page computer printout generated from "Hospital Admission Card data files (1942-1945; 1950-1954), created by the Office of the Surgeon General Department of the Army," that referred to information concerning his military service and treatment for pneumonia. R. at 164. This printout contained the unexplained notation "80% residue." The rating board found that the Hospital Admission Card data did not constitute new and material evidence, and again denied the claim in November 1988. In response, the veteran submitted a lengthy sworn statement describing the hardships of his wartime service along with a history of his military unit. In his statement, he offered the following interpretation of the phrase "80% residue":

Residue--The remainder of something after a part is removed--medically this simply states that the hospital records acknowledged that the cure or medication was only 20% effective and the 80% was the residue and or residual remaining upon discharge from the hospital. R. at 171. He also submitted copies of daily sick reports that, without exception, were duplicates of those submitted earlier, and a news article concerning the VA's discovery of additional

military medical records. In August 1989, the Regional Office at Phoenix, Arizona, once again confirmed the denial of service connection for Hesse's COPD. In testimony a few days later at a regional office personal hearing, Hesse could not recall any details concerning his 1945 disability claim. The hearing officer denied his claim, and Hesse took his case to the BVA once more.

In April 1990, the BVA issued a decision in which it denied the claim. The Board did not expressly state that it did not find the newly submitted evidence new and material; however, it stated that facts "previously established," i.e., the daily sick call reports, and other evidence, i.e., Hesse's testimony and the history of his military unit, "do not serve to establish" service connection for the claim. *Hesse*, BVA 90-13896, at 4. A timely appeal to this Court followed.

II. ANALYSIS

Upon review, we are first and foremost struck by the observation that during the veteran's lifetime, he was apparently awarded a 10% disability rating for a lung condition; yet, he never received any compensation under that rating, nor does the record suggest that the award was rescinded or the rating reduced. The record clearly indicates that the veteran, once having learned of the 1945 rating (which the BVA has not disputed was actually awarded), took all reasonable steps within his power to further document its authenticity and to claim any benefits to which it may have entitled him. In each of its decisions since 1985, including the decision before us in this appeal, the Board failed to discuss the question of whether the veteran was entitled to benefits under an existing rating. Upon remand, the Board must examine this question and adequately explain either 1) why the veteran was or was not entitled to benefits under the 1945 award, or 2) why the issue was not properly before the Board in its April 17, 1990, decision.

Further, in its discussion of the Surgeon General's Hospital Admission Card data, the Board failed to respond adequately

to the veteran's argument concerning proper interpretation of the phrase "80% residue." *See* R. at 164, 171. Because the Board did not address this question, there is nothing in the record before us to indicate whether the veteran's interpretation was correct or not. If his interpretation was correct, the Hospital Admission Card data might well be considered "new and material" evidence that would require reopening of his previously disallowed claim "in light of all the evidence, both new and old." *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991); *see also* 38 U.S.C. § 5108 (formerly § 3008). The BVA may not disregard the issues a veteran raises in his appeal. *See Smith v. Derwinski*, 2 Vet.App. 137, 141 (1992). Consequently, upon remand the Board must adequately explain (perhaps with the aid of an interpretive key) the significance of the Hospital Admission Card data, as well as the Board's conclusion on the question of whether those data constitute new and material evidence. If the Board concludes that the evidence is new and material, it must reopen what is now appellant's claim for service connection for her deceased husband's COPD.

III. CONCLUSION

The BVA's decision of April 17, 1990, is VACATED, and the case is REMANDED to the Board for further proceedings consistent with this opinion. The Court retains jurisdiction and directs that, upon completion of the remand proceeding, the Secretary shall file with the Clerk and serve upon appellant a copy of the Board's decision. Within 14 days after such filing, appellant shall notify the Clerk whether she desires to seek further review by the Court. It is so Ordered.

APPENDIX H

IN THE APPEAL OF XC 8 738 689
OPHEL H. ZEVALKINK

IN THE CASE OF
JAMES B. ZEVALKINK

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

DOCKET NO. 90-54 825) DATE JUN 10 1991
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THE ISSUES

Whether new and material evidence has been submitted establishing entitlement to service connection for kidney failure, for the purpose of accrued benefits.

Entitlement to service connection for hypertension, for the purpose of accrued benefits.

Entitlement to service connection for rheumatoid arthritis, for the purpose of accrued benefits.

Entitlement to service connection for myalgia, for the purpose of accrued benefits.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESSES AT HEARINGS ON APPEAL

The veteran and the appellant

CONSULTATIONS BY THE BOARD

J. Fussell, Counsel to the Board

ITEMS RELATING TO PRESENT APPELLANT STATUS

The issue of entitlement to service connection for a kidney disability was addressed by the Board of Veterans' Appeals in April 1985. In that decision, the Board denied entitlement to service connection for a kidney disability and held that despite contentions to the contrary, the veteran's service discharge examination revealed normal clinical and laboratory findings and that there was no evidence of a genitourinary abnormality until VA examination in June 1973, decades after service. In that decision, the Board made the following findings of fact:

> "1. Kidney disability was not present in service or shown until many years following separation from service.
>
> "2. The veteran failed to file a notice of disagreement within one year of notice of the December 1965 decision of the originating agency which denied entitlement to service connection for a kidney condition.
>
> "3. Evidence received subsequent to the December 1965 decision does not show the onset of a kidney disorder within a year following separation from service."

Based on those findings of facts, the Board made the following conclusions of law:

> "1. A kidney disability was not incurred in or aggravated by wartime service. (38 U.S.C. 310)
>
> "2. The December 1965 decision of the originating agency which denied entitlement to service connection for a kidney disorder is final based upon the evidence then of record; subsequently received evidence fails to

present a new factual basis for revision of the decision. (38 U.S.C. 4005; 38 C.F.R. 3.102, 3.104(a), 19.129(a))"

This appeal stems from a rating action of April 1987 which denied service connection for the claimed disorders. During the pendency of this appeal, the veteran died on December 7, 1988, of cardiopulmonary arrest due to chronic renal failure. The appellant (the veteran's wife) has continued the appeal and the issues were remanded in December 1990 for further development. The case has now been returned for final appellate consideration.

We observe that in a typewritten addendum to an additional Formal Appeal (VA Form 1-9) of January 1991, the appellant seeks to reopen her claim for entitlement to service connection for the cause of the veteran's death which was previously denied by rating action of August 1989. This matter is not inextricably intertwined with the issues currently on appeal and is brought to the attention of the agency of original jurisdiction for appropriate consideration.

Additionally, at the hearing of March 1987, the veteran testified that he sustained an injury of the cervical spine in 1963 which he felt was due to osteoporosis from his kidney problems (see page 5 of transcript of the March 1987 hearing). We construe this to have been a claim for service connection for residuals of an injury of the cervical spine and this matter is also brought to the attention of the agency of original jurisdiction.

CONTENTIONS

In substance, the appellant and her representative contend that the veteran had a kidney disorder which was detected at the time of a urinalysis at service separation. It is asserted that in addition to his own urine sample, he donated his urine to be used as a specimen sample for a service comrade. It is maintained that both urine samples indicated the presence of a

kidney disability and that the veteran and his service comrade had to provide further urine samples and that the veteran's additional urine samples continued to test positive because of some kidney problem. It is contended that the report of the service discharge examination is erroneous and that the veteran did not waive dental treatment but rather waived treatment for any kidney disability.

It is asserted that the veteran was treated for kidney disability in the 1950's and was rejected for life insurance in 1950 because of kidney problems. It is maintained that he continued to have disability of the kidneys after service and that he developed hypertension due to his renal pathology. It is averred that he developed rheumatoid arthritis and myalgia during military service for which he was hospitalized. It is asserted that he was told at service discharge that he had arthritis but that it could not be treated. It is contended that he was evaluated by a chiropractor in 1947 or 1948 and informed that X-rays disclosed problems with his back. It is maintained that some of the veteran's service medical records may be missing because there are no available records reflecting an injury to his teeth (disability not at issue) and that some of his service medical records may have been co-mingled with the service medical records of his brother, sister, and cousin, all of whom have the same last name as the veteran. It is requested that all doubt be resolved in favor of the veteran.

THE LAW AND REGULATIONS

Upon the death of a veteran, periodic monetary benefits to which he/she was entitled on the basis of evidence in the file at date of death, and due and unpaid for a period of not more than 1 year prior to death, may be paid to the living person first listed as follows: (1) His/Her spouse, (2) His/Her children (in equal shares), (3) His/Her dependent parents (in equal shares). (38 U.S.C. 3021)

When a claim is disallowed by the Board of Veterans' Appeals, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered. (38 U.S.C. 4004(b)).

When a claimant requests that a claim be reopened after an appellate decision and submits evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, whether it provides a new factual basis for allowing the claim. An adverse determination as to either question is appealable. (38 U.S.C. 4004(b); 38 C.F.R. 19.194)

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim. (38 U.S.C. 3008, effective on and after September 1, 1989)

"New and material evidence" means evidence not previously submitted to agency decision makers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim. (38 C.F.R. 3.156(a), effective on and after January 22, 1991)

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by wartime service. (38 U.S.C. 310)

Where a veteran served 90 days or more during a period of war and arthritis or cardiovascular-renal disease, including hypertension, becomes manifest to a degree of 10 percent within 1 year from date of termination of such service, such

disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. (38 U.S.C. 301, 312, 313; 38 C.F.R. 3.307, 3.309)

A 10 percent evaluation is warranted for hypertensive vascular disease (essential arterial hypertension) where the diastolic pressure is predominantly 100 or more. A minimum 10 percent evaluation is also assigned when continuous medication is shown necessary for the control of hypertension and there is a history of diastolic blood pressure of predominantly 100 or more. (38 C.F.R. Part 4, Code 7101)

Service connection may be granted for disability which is proximately due to or the result of a service-connected disease or injury. (38 C.F.R. 3.310(a))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt is one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. (38 C.F.R. 3.102)

When, after consideration of all evidence and material of record in a case before the Department of Veterans Affairs with respect to benefits under laws administered by the Department of Veterans Affairs, there is an approximate balance of positive and negative evidence regarding the merits of an issue material

to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. (38 U.S.C. 3007(b); effective on and after September 1, 1989)

REASONS AND BASES

The veteran had active service from February 1943 until December 1945.

With respect to the claim for service connection for kidney failure, service connection for kidney disability was denied by the Board of Veterans' Appeals in April 1985. The evidence on file at that time included the veteran's service medical records which revealed that his genitourinary system was normal on examination for service entrance and the examination for separation from service in December 1945. A urinalysis in conjunction with service discharge disclosed no albumin. The two statements of the veteran in September 1984 and the statement of David Schwabauer of October 1984 were also considered. In substance, these statements were to the effect that the veteran had donated urine samples on behalf of Mr. Schwabauer and that because of this both men were held for further urinalyses and that the veteran's urine specimens continued to test positive. A statement from Dr. Dayes in June 1973 noted that a urinalysis in that same month was positive for proteinuria and that based on the veteran's history of proteinuria at service discharge, which he had not had at service entrance, it was felt to be of service origin. It was also related by the veteran in his claim of May 1984 that he had been rejected for life insurance because of kidney problems.

Nevertheless, this evidence did not outweigh the report of the urinalysis at service discharge which disclosed no albumin and the absence of clinical evidence during the more than 25 years between service discharge and the earliest clinical evidence of possible renal pathology in June 1973. The report of the service discharge examination did not reflect that he waived treatment for kidney problems. Rather, it shows that he waived

dental treatment. In this regard, a rating action in June 1947 granted service connection for several of the veteran's teeth for the purpose of VA outpatient dental treatment.

The first truly definitive evidence of renal pathology is a statement of a VA physician in September 1984 which noted that the veteran was then being treated for renal failure and possible nephrosclerosis. Based on this evidence, the decision of the Board in April 1985 was adequately supported by the evidence of record and is final.

In order to now establish entitlement to service connection for kidney disability, there must be new evidence which is relevant and material and which establishes a basis for service connection for kidney disease. In this respect, the duplicate copy of the statement of a VA physician of September 1984 and the duplicate copy of the report of the service discharge examination in December 1945 are not new because the originals were previously on file. Likewise, the photostatic copy of a service clinical record dated February 7, 1944, is not new because the original was previously on file.

Regarding the veteran's service clinical records, it is contended that there may have been some co-mingling of the veteran's service medical records with those of either his brother, sister, or cousin. Pursuant to consent forms obtained from the veteran's brother and sister in 1988, their service medical records were reviewed and disclosed no co-mingling with the veteran's service medical records (see rating action and Supplemental Statement of the Case of August 1989). An additional search revealed some co-mingling of the service medical records of the veteran's cousin with the veteran's but not, on the other hand, co-mingling of the veteran's service medical records with his cousin (see page 5 of the transcript of a hearing of September 1988). Moreover, pursuant to a consent form of September 1988, the service medical records

of David Schwabauer were reviewed and there was only a single report of a urinalysis and it was negative (see again the rating action and Supplemental Statement of the Case of August 1989). As these searches revealed nothing positive or which supports the claim for service connection for kidney disability, this evidence is not relevant.

Furthermore, the statement of Mr. Schwabauer in November 1986 and the testimony of the veteran and the appellant (the veteran's wife) in March 1987 and September 1988 essentially recapitulated the evidence which was previously on file and are not new. Likewise, the records of the veteran's VA hospitalization in January and February 1986 and the outpatient treatment record of March 1986 merely confirmed that the veteran had renal pathology at that time. These records have no probative value with respect to antedating such renal pathology to his service decades earlier. In fact, the discharge summary of hospitalization in January and February 1986 noted only that the veteran had a history of renal insufficiency (as well as hypertension) for at least two years. Accordingly, this evidence is not material.

Overall, the additional evidence received since the decision of the Board in April 1985 merely recapitulates the contentions and statements previously on file and does not clinically document the presence of renal pathology prior to June 1973, more than 25 years after service discharge. Accordingly, the new evidence is not relevant and material and does not otherwise establish a basis for a grant of service connection for kidney disability.

With respect to the claim for service connection for hypertension, the veteran's blood pressure readings during service were within normal limits. Specifically, his blood pressure was 94/74 at service entrance and was 140/88 on examination for service discharge. When examined by Dr.

Conley in May 1965, the veteran's blood pressure was 130/80. The earliest evidence suggestive of hypertension is a borderline diastolic blood reading of 90 on VA general medical examination in October 1972. He had an elevated diastolic blood pressure of 94 on VA examination in June 1973 but at that time he did not report having a history of hypertension. It was first noted by a VA physician in a statement in September 1984 that the veteran was being treated for primary hypertension. Accordingly, there is no sound basis for concluding that the hypertension first manifested years after active service and after the incurrence of nonservice-connected renal pathology, is of service origin. With respect to the contention that the veteran's hypertension is secondary to renal disability, we observe that service connection is not in effect for renal disability and thus service connection on a secondary basis is not warranted.

As to the claims for service connection for rheumatoid arthritis and myalgia, the service medical records are negative for those disorders. There is a service clinical record which reveals that the veteran was admitted to a military medical facility on February 7, 1944 but it is not shown that he was admitted for any musculoskeletal disability. Although his hospitalization is not inconsistent with his statements and testimony that he was hospitalized for several days during service while overseas for pain in his back and legs, and during which time he was given crutches to use, there is no evidence of chronic arthritis or myalgia until many years after service. In fact, the service discharge examination disclosed no abnormality of the veteran's musculoskeletal system. Such an abnormality is not shown until a post service occupational injury in June 1963 when the veteran sustained an injury of the neck with herniation of cervical discs necessitating fusion of the cervical spine, as indicated by private clinical records of 1965. In fact, a report of an examination by Dr. Conley in May 1965 disclosed that the veteran's motor system was normal.

Although he had slight upper dorsal kyphosis at that time and the veteran reported that prior examinations had supposedly found arthritis of the neck, there is no evidence antedating the veteran's complaints of back pain as well as radicular upper and lower extremity pain to a point in time prior to the injury in 1963. Rather, it was noted that he had never had any previous, serious illness or injury. It was reported by Dr. Conley in May 1965 that the veteran's symptoms were probably related to an injury superimposed upon cervical osteoarthritic spondylosis. Nevertheless, there is no evidence to provide a basis for antedating the cervical spondylosis to the veteran's service, decades earlier. Equally important is the fact that Dr. Roback reported in October 1969 that the veteran's subjective complaints and objective findings referrable to his mid and low back as well as upper extremities appeared to be due to the post service injury in June 1963.

A review of both private and VA clinical evidence for many years after service discloses that the veteran did not relate any complaints of pain in the upper or lower back or in the extremities to his period of military service. In fact, on VA orthopedic and neurological examinations in June 1973 it was reported, in essence, that he had spinal problems and radiculopathy since the injury in 1963. Consequently, we find no reasonable basis for concluding that any arthritis or myalgia that the veteran may now have is attributable to his military service decades earlier rather than the intervening post service injury in June 1963.

In reaching this determination, we have given due consideration to the doctrine of the resolution of doubt in favor of the veteran. The facts, however, do not give rise to a doubt that could be resolved in favor of the veteran.

In reaching this determination, we have given due consideration to the doctrine of the resolution of doubt in favor

of the veteran. The facts, however, do not give rise to a doubt that could be resolved in favor of the veteran.

FINDINGS OF FACT

1. The veteran had active service from February 1943 until December 1945, and died in December 1988.

2. The evidence on file at the time of the decision of the Board in April 1985, which denied service connection for a kidney disability, did not show the existence of renal pathology prior to June 1973, decades after service discharge, and that decision of the Board is final.

3. New evidence which is both relevant and material has not been received since the decision of the Board in April 1985 establishing service connection for kidney disability.

4. Hypertension, first shown decades after active service, is not causally or etiologically due to a service-connected disability and the veteran was not service connected for any disorder at the time of his death on December 7, 1988.

5. Any arthritis and myalgia that the veteran may now have is first shown decades after active service, after a post service spinal injury in June 1963.

CONCLUSIONS OF LAW

1. The Board of Veterans' Appeals decision of April 1985 denying service connection for a kidney disability is final and the evidence submitted since that time, considered in combination with the record as a whole, does not establish that a kidney disorder was incurred in service, nor may a renal disorder be presumed to have been so incurred, for the purpose of accrued benefits. (38 U.S.C. 301, 310, 312, 33, 3008, 3021, 4004(b); 38 C.F.R. 3.156(a), 3.307, 3.309, 19.194)

2. For the purpose of accrued benefits, hypertension was not incurred in or aggravated by active service nor may it be

presumed to have been so incurred. (38 U.S.C. 301, 310, 312, 313, 3021; 38 C.F.R. 3.307, 3.309, Part 4, and Diagnostic Code 7101)

3. For the purpose of accrued benefits, rheumatoid arthritis was not incurred in or aggravated by active service nor may it be presumed to have been so incurred. (38 U.S.C. 301, 310, 312, 313, 3021; 38 C.F.R. 3.307, 3.309)

4. For the purpose of accrued benefits, myalgia was not incurred in or aggravated by active service. (38 U.S.C. 310, 3021)

ORDER

For the purposes of accrued benefits, service connection for kidney failure, hypertension, rheumatoid arthritis, and myalgia is denied.

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

*

(BOARD MEMBER VACANCY) PAUL M. SELFON, M.D.

LAWRENCE M. SULLIVAN

Supreme Court, U.S.
FILED
MAY 19 1997
CLERK

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No. 96-1473

In the Supreme Court of the United States

OCTOBER TERM, 1996

OPHEL H. ZEVALKINK AND ELEANOR M. HESSE,
PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
MIGUEL A. SERRANO
ANDREA I. KELLY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether, when a veteran dies while his or her disability claim is pending on appeal, the veteran's spouse must present any derivative claim for "accrued benefits" under 38 U.S.C. 5121 in a new action filed with the Department of Veterans Affairs.

2. Whether, when pursuing such a derivative action, the veteran's spouse is properly deemed, for purposes of issue preclusion, to stand in the same procedural position as the veteran at the time of the latter's death.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1473

OPHEL H. ZEVALKINK AND ELEANOR M. HESSE,
PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 102 F.3d 1236.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1996. The petition for a writ of certiorari was filed on March 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The panel consisted of Chief Judge Archer and Judges Rich and Michel. Judge Rich's name is inadvertently omitted at Pet. App. 1a, but appears at 102 F.3d 1236.

STATEMENT

1. A veteran may file a claim for benefits with the Department of Veterans Affairs (Department or VA) for a "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service." 38 U.S.C. 1110, 1131. The veteran must first present the claim to a regional office or other division of the Department; if the claim is denied, the veteran may then appeal to the Board of Veterans' Appeals (Board), which is also within the Department.

Until 1988, veterans generally had no right to judicial review of final Board decisions denying their disability claims. In the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, however, Congress created the Court of Veterans Appeals (CVA) specifically to review such decisions. If denied relief in the CVA, a veteran may then, in certain circumstances, seek further review in the United States Court of Appeals for the Federal Circuit and, ultimately, this Court. As a general matter, once the denial of a claim becomes final, "the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered," 38 U.S.C. 7104(b), unless the claimant identifies "new and material evidence" to support the claim, 38 U.S.C. 5108. See also 38 C.F.R. 3.105(a) (authorizing revision of administrative decisions based on "clear and unmistakable error").

Upon a veteran's death, certain close family members—and specifically the veteran's spouse, if still living—may file a derivative claim for the veteran's

"accrued benefits" under 38 U.S.C. 5121. Neither Section 5121 nor any other provision of law, however, entitles a veteran's spouse to all benefits to which the veteran would have been entitled had he or she continued living. Instead, it entitles an "accrued benefits" claimant only to "periodic monetary benefits * * * to which [the veteran] was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of death * * * and due and unpaid for a period not to exceed two years." *Ibid.*[2]

2. a. James B. Zevalkink served on active duty in the United States Army from 1943 to 1945. In the decades following his separation from the Army, Mr. Zevalkink filed a number of unsuccessful disability claims, alleging that his service during the Second World War had led to certain medical disorders, including kidney disease. See Pet. App. 19a-21a. Mr. Zevalkink died on December 7, 1988. Shortly thereafter, his widow, petitioner Ophel Zevalkink, filed this claim under Section 5121 for accrued benefits based on, inter alia, the same kidney disorder that Mr. Zevalkink had repeatedly alleged in his own disability claims. After lengthy administrative proceedings before the VA's regional office, the Board ultimately denied that portion of petitioner Zevalkink's accrued-benefits claim on the ground that there was no "new and material evidence" to justify reopening the Board's earlier, and procedurally final, disposition of

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[2] Section 5121 was amended in 1996 by the Veterans' Benefits Improvements Act, Pub. L. No. 104-275, Tit. V, § 507, 110 Stat. 3343, which changed the "due and unpaid" period from one to two years.

the kidney-related allegations in 1985. Pet. App. 70a-71a; see generally 38 U.S.C. 5108, 7104(b).[3]

On appeal, the CVA affirmed. The CVA first rejected petitioner Zevalkink's argument that, because she herself had not been a party to the multiple proceedings addressing Mr. Zevalkink's own disability claims, it would "unfair" to bar her from relitigating the kidney-related allegations underlying those claims based on the *same* evidence upon which Mr. Zevalkink had unsuccessfully relied. The CVA reasoned that, in the absence of "new and material evidence," allowing a spouse to relitigate issues fully and finally adjudicated during a veteran's lifetime would ignore "the basically derivative nature" of an accrued-benefits claim and undermine the "finality/reopening provisions of * * * the VA claims adjudication process." Pet. App. 28a (citing *Russell* v. *Principi*, 3 Vet. App. 310, 312 (1992), and 38 U.S.C. 7104(b), 7105(c), and 5108). The CVA then affirmed the Board's determination that petitioner Zevalkink had in fact failed to identify "new and material evidence" of service-connected kidney disease. Pet. App. 32a-34a.

b. In 1976, Burt Hesse, another veteran of the Second World War, first applied for disability benefits for pulmonary disease that he attributed to his wartime service. The regional office and the Board denied that claim in 1977, and, during the ensuing 11 years, Mr. Hesse unsuccessfully sought to reopen his

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[3] The Board also rejected on the merits the portions of petitioner Zevalkink's accrued-benefits claim that were based on her deceased husband's other alleged medical disorders. Pet. App. 71a-74a. That aspect of the Board's decision was affirmed by the CVA, see *id.* at 34a-35a, and is not presented for review in this petition.

claim at least eight times. In 1990, the Board issued its last decision denying Mr. Hesse's efforts to reopen his claim, and, while an appeal from that decision was pending in the CVA, Mr. Hesse died. Pursuant to Rule 43(a) of its Rules of Practice and Procedure (see 38 U.S.C. App. at 730 (Supp. V 1993)),[4] the CVA substituted petitioner Eleanor Hesse as the appellant in her deceased husband's appeal. In 1992, the CVA vacated the Board's decision and remanded for consideration of certain evidence that Mr. Hesse had earlier submitted in support of his claim. The Board reaffirmed its earlier decision on the ground that the authenticity of the evidence had not been proven, and petitioner Hesse again appealed to the CVA. Pet. App. 4a-5a.

Before the CVA addressed petitioner Hesse's appeal from that ruling, however, it decided *Landicho* v. *Brown*, 7 Vet. App. 42 (1994). In *Landicho*, relying in part on a portion of its earlier decision in petitioner Zevalkink's case (see Pet. App. 23a-24a), the CVA held that, when a veteran dies during the pendency of his or her appeal of a denial of disability benefits, the veteran's spouse may not be substituted as a party to the appeal, but must instead file an original action with the VA for accrued benefits under 38 U.S.C. 5121. The CVA reasoned that, under 38 U.S.C. 5112(b)(1), veterans' claims do not survive their deaths; that only Section 5121 authorizes surviving family members to derive benefits from a deceased veteran's claim; and

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[4] That Rule provided, in relevant part, that "[i]f a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under [38 U.S.C. § 5121(a)], the personal representative of the deceased party's estate, or any other appropriate person may be substituted as a party."

that accrued-benefits claims are distinct from disability claims and must therefore be pursued in different proceedings. 7 Vet. App. at 47-48.

Finally, the CVA held that an accrued-benefits claimant is not "adversely affected" by, and therefore lacks standing to challenge, an adverse disability-benefits decision by the Board that is pending on appeal at the time of a veteran's death. 7 Vet. App. at 49 (citing 38 U.S.C. 7266(a)). The CVA reasoned that once an original accrued-benefits proceeding is initiated, the "claimant stands in the exact position vis-a-vis adjudication of the deceased veteran's underlying disability-compensation claim as did the veteran immediately prior to his or her death," 7 Vet. App. at 52, and that any Board decision pending on appeal at the time of a veteran's death is "rendered a nullity" for purposes of a subsequent accrued-benefits claim, *id.* at 53. As a result, an accrued-benefits claimant in those circumstances may present allegations already rejected in the non-final (and therefore "nulli[fied]") Board decision without thereby violating the "new and material evidence" standard. See *ibid.* The CVA specifically corrected any "misapprehen[sion]" that its earlier decision in petitioner Zevalkink's case suggested a contrary conclusion. *Ibid.*

Because the CVA's decisions in *Landicho* and petitioner Zevalkink's case were dispositive of petitioner Hesse's efforts to be substituted as the appellant in her deceased husband's disability-benefits case, the parties jointly asked the CVA to dismiss the appeal on the basis of those precedents and to permit an immediate appeal of that dismissal to the Federal Circuit. The CVA granted that joint request. Pet. App. 53a.

3. After consolidating the separate appeals of petitioners Zevalkink and Hesse, the court of appeals affirmed. It first rejected petitioners' contention that, even in the absence of "new and material evidence," an accrued-benefits claimant may relitigate issues finally decided against a deceased veteran as part of a full and fair adjudication of the latter's disability-benefits claim. Like the CVA, the court of appeals held (Pet. App. 10a-11a) that, because petitioners' claims for accrued benefits are derivative of the deceased veterans' disability claims, petitioners are as bound by the finality provisions of 38 U.S.C. 5108 and 7104(b) as the veterans themselves would have been if they were still living. The court then held that, consistently with the CVA's decision in *Landicho*, petitioner Hesse "is not 'adversely affected' by," and therefore lacks statutory authority to challenge, the CVA's requirement that she file an original action with the VA for accrued benefits rather than continue her deceased husband's appeal for disability benefits. Pet. App. 14a-15a.

ARGUMENT

1. Citing procedures employed under unrelated federal benefits statutes (see Pet. 9-11), petitioner Hesse asserts a right to be substituted for her deceased husband and to continue the proceedings that he originally initiated to recover disability benefits.[5] Because petitioner Hesse suffered no legally cognizable injury from the denial of such substitution, however, she lacks standing to contest it. See generally

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[5] Because petitioner Zevalkink brought her Section 5121 claim by filing an original action in the VA, she does not allege a right to be substituted in any proceeding initiated by her husband and pending at the time of his death.

Warth v. *Seldin*, 422 U.S. 490, 498-499 (1975); see also 38 U.S.C. 7266(a) (party must be "adversely affected" by Board decision in order to appeal it to CVA).

In the "accrued benefits" provision of Section 5121, Congress prescribed the limited entitlement of a veteran's surviving spouse to a portion of the benefits to which the veteran was entitled at the time of his or her death: specifically, the amount "due and unpaid for a period not to exceed two years."[6] Petitioner Hesse does not appear to claim entitlement to benefits independently of Section 5121; in particular, she does not assert a substantive right to benefits greater than what Section 5121 provides to surviving spouses. See, *e.g.*, Pet. 3, 7, 11, 13-19; see also Pet. App. 6a n.4. Instead, she asserts a procedural right to have her Section 5121 claim adjudicated as a continuation of her deceased husband's disability proceedings rather than, as required by *Landicho* v. *Brown*, 7 Vet. App. 42 (1994), by bringing an original Section 5121 action in the VA after her husband's death.

The court of appeals held (Pet. App. 14a-15a), and petitioner Hesse does not dispute, that she lacks standing to challenge the administrative exhaustion requirement set forth in *Landicho* unless she can show that it has caused her some substantive injury. Petitioner Hesse does claim to have suffered such an injury. In particular, throughout the petition, she

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[6] Thus, even if petitioners were correct that "the background rule under all federal benefits statutes is that claims survive the deaths of the claimant unless Congress' contrary intent is explicit" (Pet. 9), that rule would be irrelevant here: Congress could not have been more explicit in confining a surviving spouse's substantive entitlement, upon the death of a veteran, to the benefits described in Section 5121. As discussed in the text, petitioners do not appear to contend otherwise.

maintains that, if she is not substituted for her deceased husband in his disability-benefits appeal, she will be "precluded" or "collaterally estopped" in any original action under Section 5121 "from raising issues pending on Mr. Hesse's appeal before his death." Pet. 8; see also *id.* at i (question 2), 7, 13-19.

That assertion—which is both the jurisdictional premise of the first question presented in the petition and a factual premise of the second (see Pet. i)—is incorrect. As the CVA made clear in *Landicho*, any "nonfinal[]" administrative adjudication of a veteran's disability-benefits claim is "rendered without force or effect by his death—meaning that it then bec[omes] a nullity" for purposes of a spouse's subsequent claim for accrued benefits. 7 Vet. App. at 52; see p. 6, *supra*. Put another way, upon filing a timely, original claim for accrued benefits, a surviving spouse is no less free to pursue the issues that were pending on a deceased veteran's appeal than the veteran would have been if he or she had not died. See *Landicho*, 7 Vet. App. at 51-53. Nothing in the court of appeals' decision in this case is to the contrary. Accordingly, petitioner Hesse is not substantively harmed by, and therefore lacks standing to contest, the requirement that she file an original accrued-benefits action in the VA rather than appear as a substituted party in her deceased husband's appeal in the CVA.[7]

2. Petitioners also challenge the court of appeals' holding that, in the absence of "new and material evidence," an accrued-benefits claimant generally may not relitigate issues that were decided against the

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[7] Petitioner Hesse does not contend, and the court of appeals did not hold, that her accrued-benefits claim would be barred as untimely. See Pet. App. 13a, 15a.

veteran as a necessary component of a *final* adjudication of the veteran's disability claim. In petitioners' view, because a surviving spouse was not a party to the veteran's prior disability-benefits proceedings, the spouse—unlike the veteran during his or her lifetime—should not be bound by the final resolution of any issues in those proceedings. That position is without merit.

A surviving spouse's accrued-benefits claim is derivative of a deceased veteran's disability claim in that the spouse's entitlement is based on the veteran's entitlement at the time of death. Petitioners contend that, in establishing a veteran's entitlement, surviving spouses should be able to do what the veterans themselves could not have done in pursuing their own claims: rely on previously considered evidence to reopen issues already finally decided against them. As the court of appeals suggested (see Pet. App. 9a-11a), however, it would be anomalous for an accrued-benefits claimant—whose substantive entitlement to benefits is derivative of a veteran's—to stand in a procedural position superior to that occupied by the veteran before his or her death. Nothing in the text of Section 5121 compels that result. Indeed, as the CVA observed (Pet. App. 28a-29a), petitioners' effort to avoid the "new and material evidence" requirement is inconsistent with the statute's finality provisions, which specify that the identification of such evidence is a precondition to filing a "claim based on the same factual basis" as a prior claim whose denial has become final. 38 U.S.C. 7104(b); see also 38 U.S.C. 5108.

Petitioners also contend that it would violate due process to require "new and material evidence" before a surviving spouse may reopen factual issues finally

decided against a deceased veteran. As a general rule, however, a party asserting a wholly derivative claim is bound by final decisions regarding the original claim on which the new claim is based. See, *e.g.*, *Terrell* v. *DeConna*, 877 F.2d 1267, 1271-1272 (5th Cir. 1989); *Roy* v. *Jasper Corp.*, 666 F.2d 714, 718 (1st Cir. 1981); see also Restatement (Second) of Judgments § 48(2) (1982). Application of that rule is particularly appropriate here. Unlike common-law principles of issue preclusion, this statutory scheme permits veterans and their surviving spouses to relitigate issues that *have* been decided against them if they either identify "new and material evidence" on those issues, 38 U.S.C. 5108, or, in certain circumstances, demonstrate that the previous decisions against them were the product of "clear and unmistakable" error, 38 C.F.R. 3.105(a). As this case illustrates, that scheme permits claimants and their surviving spouses to continue litigating their entitlement to benefits arising out of a single set of facts for many decades after the underlying medical disabilities were allegedly incurred. The statutory provisions at issue here, which operate to impose some finality on litigation under this exceptionally liberal procedural scheme, do not violate due process.

Finally, petitioners suggest (Pet. 14-15) that it would be unfair to hold them to the "new and material evidence" standard because Section 5121 permits consideration only of "evidence on file at date of death." See generally Pet. App. 11a ("we interpret [Section 5121] as permitting the new adjudication of a prior claim only if there is new and material evidence in the file which has not previously been considered"). As an initial matter, that argument is not properly pre-

sented here, because the petition identifies no "new *and* material evidence" that would have justified relief but for the requirement that the evidence appear in a veteran's file at the time of death. Cf. Pet. App. 33a. The evidence on which petitioner Hesse seeks to rely, for example, *was* in her husband's file when he died because, at that time, it was a subject of his pending appeal in the CVA. See p. 5, *supra*.

In any event, because a claim under Section 5121 is derivative of a veteran's own entitlement to benefits while he or she was still living, Congress acted reasonably in confining a surviving spouse's evidentiary basis for claiming "accrued benefits" to the evidence accumulated during the veteran's lifetime. Although that evidentiary rule may limit the opportunity of some spouses to reopen issues that have long since become final, that is only because Congress permissibly determined that, for all relevant purposes, "an accrued-benefits claimant stands in the exact position vis-a-vis adjudication of the deceased veteran's underlying disability-compensation claim as did the veteran immediately prior to his or her death." *Landicho*, 7 Vet. App. at 52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
MIGUEL A. SERRANO
ANDREA I. KELLY
Attorneys

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT L. NELSON
General Counsel
MICHAEL P. HORAN
Associate General Counsel
KAREN B. LEVIN
PARALYZED VETERANS OF AMERICA
801 Eighteenth St., N.W.
Washington, D.C. 20006

EDWARD W. WARREN
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Dated: June 3, 1997

11 pp

CHRISTOPHER A. COLE
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004
Attorneys for Petitioners

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Not so long ago, the United States cared deeply about its responsibility to the surviving spouses of veterans killed or disabled as the result of service to the Nation in wartime. That time has surely passed. So much so, in fact, that Respondent's primary aim now apparently is to bury the central issue in this case—whether a surviving spouse may continue the veteran's pending appeal for wrongly-withheld disability benefits.

Significantly, Respondent does not contest "the background rule under all federal benefits statutes [ ] that claims survive the death of the claimant." Resp. Br. at 8, n.6; *see* Pet. at 8-12. Yet, based solely on the decision below and *Landicho v. Brown*, 7 Vet. App. 42 (1994), the United States argues, albeit only in a footnote, that "Congress could not have been more explicit" that "veterans' claims do *not* survive their deaths," and "that only Section 5121 authorizes" even a limited recovery of as much as two years of back disability benefits. Resp. Br. at 5, 8, n.6 (emphasis added). As summarized below, Respondent's surprising argument that all federal benefit claims except those of veterans survive the death of the beneficiary is both unfair and contrary to logic and law.

A. Respondent Cannot Bury the Central Issue of Claims Survival Presented by the Petition.

Petitioner Hesse is now, and always has been, pursuing the action for wrongly-withheld benefits pending at her husband's death. Respondent should not be permitted to sidestep that issue as a means of avoiding the manifest conflict here with decisions of this and other courts under comparable benefits statutes. *See* Pet. at 8-12. Indeed, any other result would encourage the government to drag out the claims and appellate process until the veteran's death.

1. Petitioner Hesse represents the claim of her deceased husband.

Respondent argues that "Petitioner Hesse does not . . . assert a substantive right to benefits greater than what Section 5121 provides to surviving spouses." Resp. Br. at 8. That argument is wrong. Petitioner Hesse asserts the claim of her deceased husband, including the right of his estate to recover far more than the two years of benefits provided for surviving spouses by § 5121. Specifically, Petitioner Hesse seeks partial disability benefits improperly withheld from her husband since 1945 when, according to a 1945 VA Form P-80a, "he had been awarded a 10% disability rating for a lung condition." Pet. App. at 59a. Thus, as the United States Court of Veterans Appeals ("CVA") found in *Hesse v. Derwinski*, 2 Vet. App. 359, 361 (1992), when it reversed Mrs. Hesse's initial denial of benefits:

> Upon review, we are first and foremost struck by the observation that during the veteran's lifetime, he was apparently awarded a 10% disability rating for a lung condition; yet he never received any compensation under that rating, nor does the record suggest that the award was rescinded or the rating reduced.

Pet. App. at 61a. This CVA finding was rejected on remand to the Board of Veterans Appeals ("BVA")—not on the merits—but rather because Petitioner Hesse was understandably reluctant to turn over her original copy of the 1945 VA Form P-80a after VA officials had inspected that critical document at her home. Without the original copy, the Board in 1993 denied Petitioner Hesse's claim under a version of the "best evidence rule" which it gleaned from *Black's Law Dictionary*. Pet. App. at 48a.

2. Petitioner Hesse appealed the CVA's denial of her right to assert the claim of her deceased husband's estate.

When Petitioner Hesse appealed the above-described, 1993 BVA decision to the Court of Veterans Appeals, she was confronted for the first time with the CVA's recent decision in *Landicho v. Brown*, 7 Vet. App. 42 (1994). Shortly after her husband died in 1990, Mrs. Hesse (proceeding *pro se* under then-applicable Interim General Rule 43) requested that she be authorized to continue prosecution of her deceased husband's case. At the request of the Clerk of the CVA, she provided the necessary letter, dated January 14, 1991, affirming that she was the "personal representative of the deceased appellant's estate." *See Hesse v. Brown* (No. 95-7012), J.A. at A00438, A00436-37; *see also* App. Br. 7-8; A0439 (Hesse letter in record but not reproduced in J.A.) Under Interim General Rule 43 (comparable to Federal Rule of Appellate Procedure 43(a)), Mrs. Hesse thus was allowed to proceed as the estate's personal representative. Pet. App. 57a But after *Landicho*, which purported to extinguish the claim of the veteran's estate, she was left with no choice but to file a motion for voluntary dismissal of her appeal on the condition that she be allowed to test the legal correctness of *Landicho* on appeal to the Federal Circuit. Pet. at 4.

3. Petitioner Hesse's appeal to the Federal Circuit did not change the nature of her claim.

Respondent argues that, with Petitioner Hesse's appeal to the Federal Circuit, her claim somehow changed: she was no longer pursuing her husband's claim on behalf of his estate but rather only her own right to "accrued benefits" under the "derivative claim" provided in § 5121. Resp. Br. at 8. For this astounding proposition, Respondent miscites various pages from the Petition to this Court which it says show that Petitioner Hesse does not "claim entitlement to benefits independently of Section 5121." *Id.* But, in fact, the Petition

says just the opposite. For example, after noting the existence of a separate "claim for accrued benefits," Petitioner explained § 5121 as a remedial "death statute[] drafted in the early part of the century" which was designed to provide additional benefits that "are not the same as those that would be available in the event of a successful appeal." Pet. at 11. Likewise, in response to Respondent's argument that "the widow may not pursue her husband's appeal," the Petition emphasized that "the CVA and the Federal Circuit stand alone against the tide of decisions that provide for survival of similar government benefit claims, where the entitling statutes are silent as to claims survival." *Id.* at 7. Nor does anything in the Federal Circuit's opinion suggest Petitioner Hesse was pursuing only an accrued benefits claim.

B. Respondent Should Not Be Allowed to Confuse Claims Survival with the Separate Issue of Entitlement to Accrued Benefits under § 5121.

Claims survival and entitlement to accrued benefits are separate issues both in law and as framed by the Petition before this Court. Respondent should not be allowed to raise a smoke screen that merges or confuses these two separate issues.

1. The consolidated Certiorari Petitions of Hesse and Zevalkink present separate issues of claims survival and entitlement to accrued benefits under § 5121.

Respondent deliberately attempts to cloud the separate issues presented here by recasting the consolidated Petitions in terms of § 5121. Resp. Br. at 9. But as is evident from the two Questions Presented in the Petition itself, Petitioners Hesse and Zevalkink raise separate, albeit overlapping issues. Petitioner Hesse is pursuing her husband's claim as personal representative of his estate. (Question 1.) Petitioner Zevalkink is pursuing only her entitlement to accrued benefits under § 5121 since there was no appeal pending on behalf of her

husband at his death. (Question 2.) Section 5121 comes into play in Petitioner Hesse's case only if (1) *Landicho* is correct that her husband's claim was extinguished at death and if (2) she is precluded (as the decision below may be read to imply) from raising in a subsequent § 5121 proceeding the issues presented in her husband's appeal pending at his death. This point, as well as Petitioner Zevalkink's broader claim of entitlement to challenge under § 5121 all "factual and legal issues that were previously decided against the veteran," are included within Question 2.

2. Properly understood, claims survival and § 5121 work *in pari materia*.

Hesse is the atypical case in which a veteran has a pending disability claim at his or her death. Absent a clear statement of contrary congressional intent, the background rule is that such claims survive and may be pursued by the representative of the decedent's estate. Pet. at 8-12. Respondent does not contest this rule but argues instead that "Congress could not have been more explicit in confining a surviving spouse's substantive entitlement . . . to the benefits described in Section 5121." Resp. Br. at 8, n.6. In support of this supposedly "explicit" congressional intent, Respondent offers—not statutory text or even legislative history—but only *Landicho* and the decision below. *Id.* at 8-9. Respondent never answers Petitioners' construction of § 5121—namely, that it applies in the typical case (like Zevalkink) where the veteran has no pending disability claim at death but where the veteran may have been entitled to "periodic monetary benefits . . . under existing ratings or decisions, or those based on evidence in the file at date of death . . . ." 38 U.S.C. § 5121(a). This natural construction of § 5121 thus provides a limited dispensation (a maximum of two years' benefits) to persons like Mrs. Zevalkink, whose spouse may not have diligently pursued viable disability claims during his or her lifetime.

3. The showing required for a recovery of benefits under § 5121 cannot be defined by the *post hoc* arguments of Respondent's counsel.

Respondent wrongly characterizes Petitioners as arguing that "an accrued benefit claimant . . . stand[s] in a procedural posture superior to that occupied by the veteran before his or her death." Resp. Br. at 10. Accepting, as Petitioners do, that the accrued benefit claimant is in the same position as the decedent, there remains the question of what showing would have been required for the veteran to make out a valid claim for benefits before his or her death. Citing the VA's own statutes and regulations, Petitioners identified the many circumstances including "obvious error," change of law, "clear and unmistakable error," and "difference of opinion" that are available for veterans wishing to reopen previous benefit denials. Pet. at 15.

Rather than address these points, Respondent's counsel proceeds to interpret the statutory term "new and material evidence," largely without reference to the VA's regulations. Resp. Br. at 11-12. Likewise, with respect to Petitioner Hesse's legitimate concern about potentially being "collaterally estopped from challenging the factual and legal issues that were the subject" of her husband's dismissed appeal, Respondent's counsel reads into the Federal Circuit's decision an assurance that is not there. In fact, the decision below is entirely silent as to whether the pending appeal would be dismissed without prejudice to the right of the appellant to present the same issues again in a § 5121 proceeding. Needless to say, the arguments of Respondent's appellate counsel cannot define the scope of Petitioner Zevalkink's potential recovery under § 5121, much less guarantee preservation of Petitioner Hesse's claim for two years in back benefits in the event that dismissal of her appeal to the Court of Veterans Appeals were to be upheld by this Court.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT L. NELSON
General Counsel
MICHAEL P. HORAN
Associate General Counsel
KAREN B. LEVIN
PARALYZED VETERANS
OF AMERICA
801 Eighteenth St., N.W.
Washington, DC 20004

EDWARD W. WARREN
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 879-5000

CHRISTOPHER A. COLE
PAUL, HASTINGS,
JANOFSKY & WALKER LLP
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004
Attorneys for Petitioners

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